FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 463

WILLIAM KIDD and BARBARA MILLS,

Appellants,

v.

STATE OF OHIO,

Appellee.

Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

ALLEN BROWN,
311 Atlas Bank Bldg.,
Cincinnati 2, Ohio,
Counsel for Appellee.

October, 1958.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI OHIO

INDEX

	PAGE
Jurisdictional Statement	1
Opinions Below	2
Jurisdiction	2
Questions Presented	5
Statement of the Case	7
Federal Questions Are Substantial	11
Conclusion	17
Appendix "A"	
Opinion of the Supreme Court of Ohio	1a
Appendix "B"	
Opinions of the Court of Appeals, First Appellate Dist. of Ohio (Court of Appeals, Hamilton County, Ohio, and Court of Appeals, Butler County, Ohio)	12a
Appendix "C"	
Sections 3773.23 Through Section 3773.26 and Pertinent Excerpts from Section 3773.99 and Section 4301.22, Ohio Revised Code	19a
Appendix "D"	
Copy of Judgment Entry of Supreme Court of Ohio, Affirming Judgment of Court of Appeals of Hamilton County	22a
Appendix "E"	
Copy of Entry of Supreme Court of Ohio Denying Application for Rehearing	23a
Appendix "F"	
Copy of Notice of Appeal to the Supreme Court of the United States	24a

PAGE

Appendix "G"

Article—*Time* magazine 28a

Appendix "H"

Excerpts on Constitutional Issues from Appellant's Briefs Before Supreme Court of Ohio 32a

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES CITED

Cases

Abie State Bank v. Bryan, 282 U. S. 284 14

Board of Education v. Barnette, 319 U. S. 624 4, 13

Brown v. Board of Education, 347 U. S. 483 4, 13

Cantwell v. Connecticut, 309 U. S. 626, 310 U. S. 296 4

Cumberland Coal Co. v. Board, 284 U. S. 231 4, 13

Everson v. Board of Education, 330 U. S. 1 4

Flournoy v. Wiener, 321 U. S. 253 4

Gitlow v. New York, 268 U. S. 652 4

Grochowiak v. Pennsylvania 136 Atlantic (2) 145 No. 166, Supreme Court of United States, Oct. Term 1958 16

Gundaker Central Motors v. Gassert, 354 U. S. 933 13

Henderson v. Antonacci, 62 S. (2d) 5 12, 15

Hennington v. Georgia, 163 U. S. 299 4

Hickinbotham v. Williams, 353 U. S. 961 13

International Brotherhood of Teamsters Union v. Vogt, Inc., 354 U. S. 287, 77 S. Ct. 1166 14

Jones v. Opelika, 319 U. S. 103 4

Kedroff v. St. Nicholas Cathedral, 97 S. Ct. (Lawyers Ed.) 95 4

Kelley v. Blackburn, 95 S. 2nd 260 12

PAGE

Lanzetta v. New Jersey, 306 U. S. 451 4

McCollum v. Board of Education, 333 U. S. 203 ..... 4, 13

Morey v. Doud, 354 U. S. 457, 77 S. Ct. 1344 ..... 4, 12

Mosko v. Dunbar, 309 P. (2d) 581 13

Murdoch v. Pennsylvania, 319 U. S. 105 4

People v. Friedman, 341 U. S. 907 13

Petit v. Minnesota, 177 U. S. 164 ..... 4, 11, 13

Powell v. Alabama, 287 U. S. 45 4

Prudential Insurance Co. v. Cheek, 259 U. S. 530 4

Stanfeal v. State, 78 O. S. 24 2

State of Ohio v. William Kidd and Barbara Mills, 167 O. S. 521, 150 N. E. (2d) 413 2

State v. Towery, 347 U. S. 925 13

State of Ohio v. Ullner, 143 N. E. (2d) 849 2

Superior Films v. Dept. of Education, 346 U. S. 587 4

Taylor v. Pine Bluff, 352 U. S. 894 13

Toolson v. New York Yankees, 346 U. S. 356 4

Ullner v. Ohio No. 426, Supreme Court of United States, Oct. Term 1958 16

United States v. Ballard, 322 U. S. 78 4

United States v. Brewer, 139 U. S. 278 4

United States v. Cohen Grocery, 255 U. S. 81 4

Winters v. New York, 333 U. S. 507 ..... 4, 13

Yick Wo v. Hopkins, 118 U. S. 356 4

Zorach v. Clauson, 343 U. S. 306 4

Constitutions, Statutes and Rules

Constitution of the United States, 1st Amendment 9, 12, 17

PAGE

Constitution of the United States, 14th Amendment 9, 12, 16, 17

Title 28 United States Code, Section 1257 (2) 4

Ohio Revised Code, Section 3773.23 3

Ohio Revised Code, Section 3773.24 ..... 1, 2, 3, 5, 6, 7, 11

Ohio Revised Code, Section 3773.25 3

Ohio Revised Code, Section 3773.26 3

Ohio Revised Code, Section 3773.93 3

Ohio Revised Code, Section 4107.46 16

Ohio Revised Code, Section 4109.22 16

Ohio Revised Code, Section 4301.22 3

Supreme Court of the United States, Rule 13, Subparagraph 1 4

Supreme Court of the United States, Rule 15, Subparagraph 1 (b)(v) 3

Supreme Court of the United States, Rule 15, Subparagraph 3 2

Other Authorities

Johnson, Alvin W. and Yost, Frank H., *Separation of Church and State in the United States,* Chapters XIX and XX, University of Minnesota Press, 1948 15

Time, the Weekly Newsmagazine, October 22, 1956, Vol. LXVIII, No. 17, page 98 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. ————————

WILLIAM KIDD and BARBARA MILLS,

Appellants,

v.

STATE OF OHIO,

Appellee.

Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

Appellants, William Kidd and Barbara Mills, submit the following statement in support of their contention that the federal constitutional questions presented herein are substantial and that there is sufficient basis to invoke the jurisdiction of this Court to review on appeal the judgment and order of the Supreme Court of Ohio in Cases No. 35215 and 35216 consolidated before it, sustaining the constitutionality under both the federal and state constitutions of Ohio Revised Code, Section 3773.24. This single jurisdic-

tional statement is filed under authority of Rule 15, Paragraph 3 of this Court.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is officially reported in 167 O. S. 521, 150 N. E. (2nd) 413. A copy of this opinion is reprinted herein as Appendix "A."

A copy of the opinion of the Court of Appeals, Hamilton County, Ohio, as furnished counsel is attached hereto as Appendix "B." Since said decision refers to a decision announced concomitantly therewith, the same is also reprinted in Appendix "B." The latter is reported in 105 Ohio App. 546, 143 N. E. (2d) 849. The Municipal Court of Cincinnati rendered no opinion. The Judgment Entry of the Supreme Court of Ohio and the entry of that Court denying Appellant's application for rehearing are attached hereto as Appendices "D" and "E" respectively.

JURISDICTION

These proceedings were originally initiated by the filing of affidavits in the Municipal Court of the City of Cincinnati, alleging criminal violation of Ohio Revised Code 3773.24, commonly called the Sunday Closing, Sunday Prohibitions, or Blue Sabbath Desecration Law. The defendants were both convicted; Kidd was fined ten dollars and costs; Mills was assessed the costs of court. Stay bond, pending the outcome of this appeal, has been posted and approved by the lower courts.

The section under which the appellants were convicted, Ohio Revised Code 3773.24, is set forth in its entirety in Appendix "C" hereto. Also set forth in Appendix "C" are the other Ohio Sunday laws inasmuch as the Supreme Court of Ohio in the case of *Stanfeal* v. *State*, 78 O. S. 24, enunciated the doctrine that all the Ohio Sunday laws are

to be regarded in pari materia and construed together and as one act.

The Ohio Revised Code 3773.24 provides no person over fourteen years of age shall engage in common labor or open or caused to be opened a building or place for transaction of business, or require a person in his employ or under his control to engage in common labor on Sunday. The section does not apply to work of "necessity or charity" and does not extend to persons who "conscientiously" observe the seventh day of the week as the "Sabbath" and abstain thereon from doing things prohibited on Sunday. The section does not prevent emigrating families from traveling, watermen from landing their passengers, and keepers of toll bridges, tollgates, or ferries from attending them on Sunday. (All quotes indicated are from the statute.)

Ohio Revised Code 3773.23 prohibits theatrical, dramatic, or other type of exhibitions on Sunday and baseball playing and motion pictures in the forenoon. Ohio Revised Code 3773.25 forbids on Sunday, sporting, rioting, quarreling, hunting, fishing, or shooting. Other Sunday laws and the penal provisions appear in Appendix "C." The length of the various statutory provisions required their insertion by appendix as permitted by Rule 15, 1 (b) (v) of this Court.

The convictions of the appellants were appealed from the Municipal Court of Cincinnati to the Court of Appeals for Hamilton County, Ohio (First Appellate District of Ohio), which affirmed the same. Appeal was taken to the Supreme Court of Ohio. Judgment entry affirming the ruling of the Court of Appeals was entered on April 30, 1958 (see Appendix "D"). The appellants filed application for rehearing, which was denied by entry of the Court on May 21, 1958 (see Appendix "E"). Notice of Appeal

to the United States Supreme Court was filed in the Supreme Court of Ohio on July 15, 1958 (see Appendix "F"). On August 26, 1958, due to delays in the transmission of the record beyond the control of the appellants, for good cause shown, the Supreme Court of Ohio, under authority of Rule 13, Subparagraph 1 of this Court, enlarged the time for docketing this cause to November 12, 1958 (Record pages 25 and 32).

The jurisdiction of the Supreme Court to review these judgments by appeal is conferred by Title 28, United States Code, Section 1257 (2). The case presents several federal questions. Basically, the proceeding is grounded in a federal constitutional attack on a state statute and is reviewable by appeal. Elements of some questions raised, in the area of trial and non-uniform administration, smack of certiorari. The Court is respectfully sought to consider such elements as well as the direct issues in the nature of appeal under authority of *Flournoy* v. *Wiener*, 321 U. S. 253, 263; *Prudential Insurance Company* v. *Cheek*, 259 U. S. 530, 547, and *Cantwell* v. *Connecticut*, 309 U. S. 626, 310 U. S. 296.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in these cases: *Board of Education* v. *Barnette*, 319 U. S. 624, 639; *Brown* v. *Board of Education*, 347 U. S. 483; *Gitlow* v. *New York*, 268 U. S. 652; *Kedroff* v. *St. Nicholas Cathedral*, 97 Supreme Court, Lawyers Edition 95; *McCollum* v. *Board of Education*, 333 U. S. 203; *United States* v. *Ballard*, 322 U. S. 78; *Murdoch* v. *Pennsylvania*, 319 U. S. 105; *Jones* v. *Opelika*, 319 U. S. 103; *Zorach* v. *Clauson*, 343 U. S. 306; *Morey* v. *Doud*, 354 U. S. 457; *Winters* v. *New York*, 333 U. S. 507; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *United States* v. *Brewer*, 139 U. S. 278; *United States* v. *Cohen Grocery*, 255 U. S. 81; *Toolson* v. *New York Yankees*, 346

U. S. 356; *Cumberland Coal Co.* v. *Board,* 284 U. S. 231; *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Superior Film* v. *Department of Education of Ohio,* 346 U. S. 587; *Powell* v. *Alabama,* 287 U. S. 45; *Everson* v. *Board of Education,* 330 U. S. 1; *Petit* v. *Minnesota,* 177 U. S. 164; *Hennington* v. *Georgia,* 163 U. S. 299.

QUESTIONS PRESENTED

The following questions are presented by these appeals:

1. Whether Section 3773.24, Ohio Revised Code, under which the appellants were convicted and which is commonly called the Sunday Closing, Sunday Prohibitions, Sabbath Desecration or Blue Law, and which forbids any form of common labor or the mere opening of a place for transaction of any business on Sunday except for work of necessity or charity, exempting persons "who conscientiously observe the seventh day of the week as the Sabbath, and abstain thereon from doing things prohibited on Sunday" is unconstitutional because it is historically and actually a law respecting the establishment of religion, reserves time from the universal body politic for primarily religious purpose, aids and discriminates on behalf of certain religions over others, imposes a mode of religion and religious observance upon all, establishes religious criteria of "rest" and conduct and exemption from conduct, prohibits the free exercise of religion, and prohibts the right of the people peaceably to assemble?

2. Whether Section 3773.24, Ohio Revised Code, is unconstitutional in that it abridges the privileges and immunities of citizens of the United States, including the appellants, and deprives the accused of liberty and property without due process of law in that it is an unwarranted and arbitrary interference by the legislative body neither justified nor logical under the police power, and

is so broad in restraint on private rights as to be basically absurd on its face and has been in fact, accorded partially with reality only on the basis of unstandardized and discriminatory administrative discretion and lassitude?

3. Whether Section 3773.24, Ohio Revised Code, is unconstitutional in violation of due process of law as a criminal statute in that it is so vague and indefinite on its face and as interpreted by the Supreme Court of Ohio—"the word 'necessity' is an elastic one"—that men of common intelligence must guess at its meaning and differ as to its application and because it pits directly, without prior administrative consideration, the legitimate judgment of the accused against the judgment of a judge or jury at peril of criminal conviction?

4. Whether Section 3773.24, Ohio Revised Code, is unconstitutional in that it alone and in conjunction with other Ohio legislation and as interpreted by the Courts and administrative officers of Ohio denies the equal protection of the law and is discriminatory against the appellants?

5. Whether the consistent mode of administration of Section 3773.24, Ohio Revised Code, and the mode of administration of Section 3773.24, Ohio Revised Code, in direct relation to the appellants and the sudden, unannounced change of implied and long-standing administrative position, the mode of arrest and prosecution of the defendants in this particular action were so manifestly unfair and unequal that a violation of due process of law and equal protection of the law arises; whether the trial court denied constitutional privileges and defenses to the appellants by refusing to allow the introduction of evidence on that consistent mode of administration, by refusing clarification of the affidavits so that the accused were truly informed of the nature or cause of the accusation and by prejudice and predetermination so obvious as to obviate due process of law?

STATEMENT OF THE CASE

Defendant-Appellant William Kidd was the owner and operator of a small, corner grocery known as "Albert's Super Market" located in a poor neighborhood in Cincinnati, Ohio. The defendant had been open on Sundays for many years, dealing on such Sundays with a multiplicity of customers, including enforcement officials. Said store operated as a retail delicatessen, grocery and meat market, selling all such goods incident thereto including milk, meat, bread, non-prescription medicines, and beer and wine carry-out as licensed by the State of Ohio. It is a matter of common knowledge that this store and similarly situated stores, to-wit, small neighborhood grocery stores, have been open on Sundays in the City of Cincinnati and throughout the State of Ohio beyond the memory of any living person without any action by the enforcement officials of the City, County or State.

In September 1956, officials of the Retail Clerks Union placed this and several stores in the Cincinnati area under surveillance, and thereafter called on the Chief of Police of the City of Cincinnati and suggested to him a list of alleged violators of Ohio Revised Code 3773.24, requesting he cause arrests (Record pages 109-111, 117). He conducted no investigation but in turn called in two officers and instructed them to make some arrests out of the list. On September 30, 1956, a Sunday, at approximately 1:00 p.m., without prior announcement of any enforcement officials, these officers, one a man, one a women, both in plain clothes, entered Albert's Super Market. They observed several customers making purchases but made no further inquiry relative to surrounding circumstances. They then took from the shelves several pointless purchases of their own, admittedly solely for the purpose of effecting citation (Record page 102), carried them to the cashier and pre-

sented them for computation and charge. The cashier computed the purchases and accepted their marked cash tendered for the same. Thereupon the officers placed under arrest the appellants, Barbara Mills, who was the cashier, and William Kidd, the owner of the store who was present on the premises. The following day, affidavits were executed by one of the arresting officers.

The cause was tried on October 26, 1956 before the Municipal Court of Cincinnati. The evidence revealed that this store was located in a poor, highly transitory neighborhood where many residents had no refrigeration; that September 30, 1956 was a warmish day; that the business would lose money unless it operated on Sunday; that an emigrating family had made purchases of necessity in this store on the day in question; that a mother had made a purchase of medical necessity for her child in this store, although she was not certain it was the Sunday in question; that the environmental neighborhood of the store was a very poor one where persons made their purchases of foodstuff on a day to day basis as they earned, and had no means of refrigeration; that towboat operators purchased in the store; that a mother of eleven children who kept their milk on a fire escape, made several daily purchases of such milk and other food in this store, and a multiplicity of other facts tending toward an attempted definition of necessity (Record pages 70-161).

Prior to trial, defendants moved to quash, and abate the affidavits and demurred to the same. The affidavit merely charged Kidd with opening the place of business, and did not indicate whether he was charged with unlocking the door or conducting business (Record page 13). It also alleged that defendant's business was not one of charity and necessity.

The trial Court in the trial of the cause appeared intent on a quick conviction. It refused to allow evidence of long

standing, unequal enforcement. It ruled that abrupt about face of administrative policy could not be raised by a plea in abatement, but was a matter of evidence, and then refused to hear evidence on the matter. It prompted prosecution witnesses (Record page 88), it bulldozed defense witnesses (Record pages 134, 135, 145, and 146). It repealed in effect the exemptive element of "necessity" from the statute by extensive and illogical curtailments of evidence on the point. In general, the defendants were convicted with "due expedition" but not due process of law.

The validity of the Sunday laws, upon which the convictions were based, was called into question upon United States constitutional issues consistently throughout the cause. From a pre-trial motion to quash or abate the affidavits, and demurring to the same (Record pages 15 through 20), through motion for dismissal at end of prosecution's case (Record pages 111 through 114), renewed at the end of trial, motion for new trial (Record page 10) and appeal at all levels the following questions were raised and reiterated:

(a) The law is repugnant to the First Amendment to the Constitution of the United States inasmuch as it is a law respecting the establishment of religion, reserves the time of Sunday from practically all normal human, commercial, recreational and general activity to certain limited usages, of which religious attendance is paramount, aids certain religions over others, imposes a mode of religion and religious observance upon all, establishes religious criteria of "rest" and conduct and exemption from conduct, prohibits free exercise of religion, and prohibits the right of the people peaceably to assemble.

(b) The law is repugnant to the 14th amendment to the Constitution of the United States in that it violates both the privileges and immunities of the accused, de-

prives them of liberty and property without due process of law, and denies to them the equal protection of the law. The appellants were deprived of their mode of making a legitimate living by a law that truly effected no benefit to the commonweal, affected no grave or immediate danger to interests which the State might lawfully protect and in logic and in true effect has no real bearing on universal cessation from work and rest. That further even if the law were properly intentioned for general rest and relaxation, rather than its obvious historical religious purpose, then it was such an arbitrary effectuation of the same—the impossible universal imposition of a given day in the light of the infinite variety of human needs, their hourly changing and varying degree, as to be still nevertheless violative of due process of law. Still further the act—and its companion acts—and its consistently inconsistent administration—creates arbitrary classifications depriving the accused of the equal protection of the law. Finally the act—especially as specifically interpreted by the Supreme Court of Ohio in the opinion from which this appeal is taken—is so vague and uncertain and relates to such varying conditions of sociology, economy, mores, and individual emergency for interpretation as to be violative of due process of law. In the instant case, in addition, a sudden and unannounced administrative turnabout after years of allowing the operation of the defendants on Sunday under the entirely reasonable presumption that they were operating under an exemption on the face of the statute constituted violation of due process of law.

Appended hereto as Appendix "H" are excerpts from the appellant's briefs touching on the Federal constitutional issues. It has been appended, even at the risk of undue length, in order that the Court may be made more fully aware of the manner in which the federal issues were presented to the Ohio courts, there being a possibility the

published opinions may leave an erroneous impression of the raising of federal issues. Except for the concurrence, the decision reprinted in Appendix "A" seems to avoid ruling on the *federal* constitutional aspects raised.

In the Supreme Court of Ohio, the constitutional questions relating to religion, due process, and discrimination, without distinction as to the federal and state constitutions, were passed upon in the first and third syllabi of its opinion (see Appendix "A"). As to the vagueness of "necessity," the Court engaged in semantic gymnastics and escaped vagueness by talk of "elasticity." The suggestion of an infinitely variable standard enhances rather than diminishes the peril under which all men subject to its penalties know what act it is their duty to avoid in compliance with Ohio Revised Code 3773.24.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are so substantial as to require plenary consideration by this Court with briefs on the merits and oral arguments for their resolution. Each question presented involves constitutional principles which affect the basic rights of appellants herein and all citizens of the United States.

The issues raised herein are not unique to Ohio. Similar, long dormant and unenforced Sunday protective legislation exists in almost every state of the Union. Recently, and basically because of the pressures of competition in a changing mercantile environment, or as an instrumentality of labor negotiations, these laws are once again, sporadically and without a general consistency of approach, being enforced. These constitutional issues are bound to recur constantly. This Court has not undertaken to review on a plenary basis any of these issues in relation to a Sunday law since *Petit* v. *Minnesota* in 1900 (177 U. S. 164, 20 Supreme Court 666, 44 L. Ed. 716). It is foolhardy to

assert that there have not been developments in the law and a changing society since then sufficient in nature to justify reconsideration and reevaluation. The first amendment through action of the fourteenth has been brought to bear upon the states. The doctrine of the wall of separation between church and state has been, in a series of cases, defined and enunciated with more precision. In the meantime a mechanized America has undergone vast changes in social interdependence, in mores and scientific progress, changing even its concept of necessities. All this brings the religious issue under the first amendment directly before the Court for the first time, casts all the issues in a new light and calls out for plenary consideration by a twentieth century court. Is there such an obvious distinction between making available public school facilities for religious instruction and casting such a pall by force of punitive statute over practically all commercial, non-commercial, do-it-yourself, sport and amusement activities of the entire community as to leave almost only a choice of either church attendance, navel contemplation, or slug-a-bed that plenary consideration is obviated?

In the several states there have been differing conclusions on the various constitutional issues. In the instant case, Ohio saw no discriminatory effect. In *Henderson* v. *Antonacci*, 62 S. (2d) 5 (1952) and *Kelley* v. *Blackburn*, 95 S. (2d) 260, the Supreme Court of Florida, in the case of a basically similar statute, especially in the latter case, and certainly an identically similar situation if administration of the law is considered, held arbitrary discrimination and unequal enforcement of the law existed and declared the law unconstitutional. The federal issue involved in these variant decisions has been as recently discussed by this Court as *Morey* v. *Doud*, 354 U. S. 457, 77 Supreme Court 1344 (1957). Indicative of the state of indecision in relation to the guarantees of the Federal Constitution in

relation to the issues awakened by the enforcement of the sabbath desecration laws is *Mosko* v. *Dunbar*, a Colorado case, not appealed to this Court (309 Pacific (2d) 581). In that case a Sunday closing law was declared unconstitutional; a motion for rehearing was filed; during the pendency of the motion, the personnel of the Court changed; the majority of the Court as then reconstituted reversed the majority of the Court as formerly constituted and the opinion, which was originally prepared as the ruling of the Court by Chief Justice Moore, became the dissenting opinion (see ibid at page 593). Certainly it is incumbent upon the Supreme Court in such a situation to fix the cardinal points of the Constitution of the United States.

In the past seven and a half years, five cases have been brought up to this Court on various aspects of the Sunday laws. *People* v. *Friedman*, 341 U. S. 907 (1951); *State* v. *Towery*, 347 U. S. 925 (1954); *Gundaker Central Motors* v. *Gassert*, 354 U. S. 933 (1956); *Taylor* v. *Pine Bluff*, 352 U. S. 894, *certiorari* denied No. 324 (1956); *Hickinbotham* v. *Williams*, *certiorari* denied 353 U. S. 961 (1957). Of these only the *Gundaker* case and the *Friedman* case arose on appeal. The *Gundaker* case in the final analysis turned on a local traffic regulation and in the *Friedman* case counsel waived constitutional issues on trial. Now foursquare before this Court are at least three appeals on direct general Sunday law criminal convictions with constitutional issues under the Federal constitution scrupulously raised and preserved by counsel through all stages of trial and appeal. This rash of cases, after a long silence since *Petit* v. *Minnesota*, reflects not only the reawakened enforcement of archaic law, but a consciousness at the bar that this Court has effected or recognized changes in the substantive constitutional law since *Petit* v. *Minnesota*, indeed since *Gitlow* v. *New York*, 268 U. S. 652, *Brown* v. *Board of Education*, 347 U. S. 483, *McCollum* v. *Board of*

Education, 333 U. S. 203, *Cumberland Coal Co.* v. *Board,* 284 U. S. 23, *Winters* v. *New York,* 333 U. S. 507, and *Board of Education* v. *Barnette,* 319 U. S. 624, to pick only random examples, which consciousness bespeaks the need for a new constitutional evaluation of the Sunday laws and their administration. To paraphrase, a "decent respect to the opinions of mankind" suggests fresh plenary consideration.

The very constant recurrence of the question, the universality of the issue in nearly all the states, the effect on the changing mercantile establishment, the effect on civil and individual liberty, respect for and uniformity in the law in the face of the phoenix-like rise and fall of the Sunday laws from the limbo of non-enforcement, all indicate the need for a fundamental constitutional consideration. Even if the Court should feel that it has spoken in perpetuity in a changing society and law in *Petit* v. *Minnesota,* nevertheless the very recurrence of the issues of late suggest plenary consideration for precise enunciation in a modern context. An alleged police regulation even though deemed to be valid when enacted may become unconstitutional by reason of later legislation or the operation of later events. *Abie State Bank* v. *Bryan,* 282 U. S. 765. In *International Brotherhood of Teamsters Union* v. *Vogt, Inc.,* 354 U. S. 284, 77 Supreme Court 1166, the Supreme Court was presented with a question similar to one raised in a previous case in which the Court had granted the Appellee's motion to dismiss for lack of a substantial question. The Court said, at page 287, "Since the present case presents a similar question, we might well have denied certiorari on the strength of our decision in that case. In view of the recurrence of the question, we thought it advisable to grant certiorari, 352 U. S. 817, 77 Supreme Court 31, 1 L. Ed. (2d) 44 and to restate the principles governing this type of case."

The era of the automobile has caused changes in merchandising, which changes and the resistance to them have caused the resurrection of enforcement of the Sunday laws. (See Appendix "G" Article from *Time* magazine.) But the very automobile which speeds quickly across state lines has emphasized the national scope of the problem, and changes in large scale merchandising and local restraints or allowance on them must have a national effect.

However, all these arguments are not as important as the fact that the issues themselves are intrinsically fundamental and substantial under the Constitution of the United States. The history of the Sunday legislation reveals their religious nature and antecedents. (For an excellent summary of such history see: Chapters XIX and XX *Separation of Church and State In the United States,* Johnson and Yost, University of Minnesota Press, 1948.) The early decisions acknowledged this and simply justified the passage of Sunday protective legislation as an expression of national religious tradition. But in the face of the wall of separation of church and state imposed by the federal constitution, the state courts engaged in a pious hypocrisy and basically fictional approach of justifying the measures under the guise of police power. But as an exercise of police power the laws are absurd, so absurd that up until recently there has been very little or no enforcement. Their language, if construed strictly, would close up everything on Sunday or if construed in any lesser degree, yields illogical discriminations, arbitrary classification, and universal doubt as to application. (See Ohio's elasticity doctrine in this very case or *Henderson* v. *Antonacci,* 62 S. (2d) 5.) The problem has been avoided by leaving the matter as far as possible to the whim and personal prejudice of local police officers. If the legislative body cannot discriminate in such legislation by permitting some to

operate and restraining others from operating on Sunday, is there power vested in police officials or judiciary which is greater than that in the legislative branch of government? What great danger is there to fundamental constitutional rights in leaving unexamined under the effects of the 14th Amendment a restrictive law so broad that it must be accorded to everyday practicalities by the unstandardized whim of enforcement officers or the pressures of competitors, zealots, or axe grinders?

What we have here, if we engage in the fiction of police power, is an unworkable and absurd anachronism, that invades the basic concepts of the Bill of Rights and the 14th Amendment. We live in a time when this Court has refused to engage in the fiction of police power to justify unconstitutional excesses, even indeed where the most vivid threats to peace and harmony have existed or been engendered in an attempt to convince this court of the necessity of police action. So here, a law, and its administration, first historically admitted to be religious in purpose, then called police power in order to avoid the wall of separation, which law is a slip-shod, catch-all exercise of police power, is vague on its face and is made even more vague and transitory by the very court charged with its final interpretation, which protects no real interest which the state may protect (for Ohio has passed wage and hour laws for the real protection of these interests, Ohio Revised Code 4107.46 and 4109.22) should be evaluated on its constitutional merits by this Court.

The appellants allude to the jurisdictional statements filed before this Court in the similar causes of *Grochowiak* v. *Pennsylvania* (136 Atl. (2d) 145), No. 166, October Term, 1958, and *State of Ohio* v. *Coleman Ullner*, (167 Ohio St. 521, 150 N. E. (2d) 413), No. 426 October Term, 1958, and asks that the questions raised therein and discussions con-

tained therein be considered as if also advanced as part of this jurisdictional statement.

CONCLUSION

The statute of Ohio under which the appellants were convicted as interpreted and applied by the Supreme Court of Ohio and as administered by the executive branch of the State of Ohio, present to this Court several substantial federal questions under the First and Fourteenth Amendments to United States Constitution, effecting the constitutional rights of these appellants and all citizens of the United States. This Court which has not ruled substantively on similar legislation for 58 years should review these various issues in the light of society and the law today, the development of the doctrine of separation of church and state, the reality and reasonableness of police power as currently evaluated, the demarcation of understandable boundaries to legislation creating criminal acts, the current limits of discrimination and the elemental rules of fair play encompassed in due process of law. An element of the state of flux through which our nation is passing needs the clear erection of its constitutional guideposts.

Respectfully submitted,

ALLEN BROWN,
311 Atlas Bank Building,
Cincinnati 2, Ohio.

APPENDIX "A"

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is officially reported in 167 Ohio State 521, 150 N. E. (2d) 413.

THE STATE OF OHIO, APPELLEE, *v.* KIDD, APPELLANT.
THE STATE OF OHIO, APPELLEE, *v.* MILLS, APPELLANT.
THE STATE OF OHIO, APPELLEE, *v.* LEFF, APPELLANT.
THE STATE OF OHIO, APPELLEE, *v.* ULLNER, APPELLANT. (Two cases.)

Sunday closing law—Section 3773.24, Revised Code, constitutional—"Work of necessity" construed—Classifications of activities prohibited on Sundays—Authority of legislative body to make—Police power.

1. Section 3773.24, Revised Code, commonly called the Sunday closing law, is a valid, constitutional and enforceable enactment and is not vulnerable to the attack that it is a measure for the enforcement or promulgation of religious observances.
2. "Work of necessity or charity" is exempted from the operation of Section 3773.24, Revised Code. The word, "necessity," is an elastic one, and what constitutes work of necessity is often a question of fact dependent on the circumstances surrounding the particular case.
3. The lawmaking branch of a state government in the exercise of its police power has the constitutional authority to make classifications and selections of those activities which it seems should or should not be prohibited on Sundays, and, so long as those classifications are not arbitrary, capricious or unreasonable and do not discriminate among the same classes or kinds of pursuits, they are valid.

(Nos. 35215, 35216, 35217 and 35218—Decided April 30, 1958.)

APPEALS from the Court of Appeals for Hamilton County.
APPEAL from the Court of Appeals for Cuyahoga County.
APPEALS from the Court of Appeals for Butler County.

Appendix "A"

In the several causes now here for review the defendants, storekeepers and one clerk, were charged with and convicted in various Municipal Courts of violating Section 3773.24, Revised Code, commonly known as the Sunday closing law, or blue law, and all the convictions were affirmed on appeal.

Causes Nos. 35215 and 35216 originated in the Cincinnati Municipal Court. Defendant Kidd was a co-owner and operator of a self-serve food market in the city of Cincinnati, and defendant Mills was clerk at the check-out counter in such store. Purchases consisting of groceries, soap, an electric iron and insect spray were made in the store on a Sunday afternoon by police officers, who then advised Kidd and Mills that they were being cited to court—Kidd for opening and conducting a business on Sunday and Mills for engaging in common labor on that day. Affidavits were subsequently filed against the two. The cases were tried concurrently, and some of the evidence introduced is to the effect that the store was located in a neighborhood inhabited and frequented by those who lacked facilities for storing and preserving food.

Cause No. 35233 originated in the Cleveland Municipal Court. Leff, the defendant, was president of the Three Bears Super Stores, Inc., an Ohio corporation, engaged in a number of stores in selling a variety of products. The store here involved was opened on a Sunday, sales of flashlight bulbs were made and prosecution followed.

Causes Nos. 35317 and 35318 had their inception in the Hamilton Municipal Court. One of the affidavits charges the defendant, Ullner, with opening or causing to be opened a building for the transaction of business on Sunday, and the other charges him with requiring a person (his employee) to engage in common labor on Sunday.

Appendix "A"

Causes Nos. 35215 and 35216 were appealed on questions of law from the Municipal Court to the Court of Appeals for Hamilton County. Cause No. 35233 went from the Municipal Court to the Court of Appeals for Cuyahoga County. Causes Nos. 35317 and 35318 went from the Municipal Court of the Court of Common Pleas of Butler County and from there to the Court of Appeals for that county.

In all causes, the Courts of Appeals affirmed the judgments of the lower courts.

All the causes are now here for disposition on appeals as of right and on the allowance of motions to require the respective Courts of Appeals to certify the records.

Mr. James W. Farrell, Jr., city solicitor, *Mr. Robert J. Paul* and *Mr. Lyle W. Castle*, for appellee in cases Nos. 35215 and 35216.

Mr. Allen Brown, for appellants in cases Nos. 35215 and 35216.

Mr. Ralph S. Locher, director of law, *Mr. Bernard J. Conway* and *Mr. Edward V. Cain*, for appellee in case No. 35233.

Messrs. Wyner & Wyner, for appellant in case No. 35233.

Mr. Clem M. Imfeld, Jr., acting director of law, *Mr. John W. Thomas*, city solicitor, and *Mr. Warren G. Bisdorf*, for appellee in cases Nos. 35317 and 35318.

Mr. Robert P. Goldman, Mr. Reuven J. Katz, Mr. Edward Pierce, Messrs. Paxton & Seasongood and *Messrs. Fitton, Pierce & Black*, for appellant in cases Nos. 35317 and 35318.

ZIMMERMAN, J. All the defendants challenge the constitutionality and validity of Section 3773.24, Revised Code, enacted by the General Assembly in the exercise of its

police power. That section, as it is pertinent here, reads as follows:

> "No person who is over 14 years of age shall engage in common labor or open or cause to be opened, a building or place for transaction of business, or require a person in his employ or under his control to engage in common labor on Sunday. . . .
>
> "This section does not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the Sabbath, and abstain thereon from doing things prohibited on Sunday."

It is axiomatic that courts may not inquire into the policy which motivated the enactment of legislation, and as stated in the first paragraph of the syllabus in the case of *State, ex rel. Dickman, a Taxpayer,* v. *Defenbacher, Dir.,* 164 Ohio St. 142, 128 N. E. (2d) 59, "an enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible."

Sunday closing laws have generally been upheld as constitutional and valid against a variety of attacks, such as, that they constitute class legislation, that they are too uncertain, that they violate the constitutional rights of citizens as to equal privileges and immunities, that they violate the right of life, liberty or the pursuit of happiness, and that they violate the constitutional right of freedom of religion. 50 American Jurisprudence, 803, Section 5; and 83 Corpus Juris Secundum, 800, Sunday, Section 3.

Many years ago in a case involving a predecessor statute to present Section 3773.23, Revised Code, Judge Minshall, writing the opinion in the case of *State* v. *Powell,* 58 Ohio

Appendix "A"

St. 324, 340, 50 N. E. 900, 901, 41 L. R. A. 854, made the following observations:

> "The policy of Sunday laws is based upon the observed fact, derived from long experience and the custom of all nations, that periods of rest from ordinary pursuits are requisite to the well-being, morally and physically, of a people. . . . This is the foundation and policy of all statutes regulating the observance of a day of rest; and whether the day selected is one consonant to the religious views of a portion of the people or not, does not affect the validity of the regulation, where no religious observance is enjoined."

Section 3773.24, Revised Code, in no way interferes with the freedom of religious worship or the free exercise of religious beliefs, nor was it designed to. As was said by Judge Thurman in the early case of *Bloom* v. *Richards*, 2 Ohio St. 387, 392:

> "Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regularly recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the General Assembly to require this cessation of labor, and to name the day of rest. It did so by the act referred to, and, in accordance with the feelings of a majority of the people, the Christian Sabbath was very properly selected. But, regarded merely as an exertion of legislative authority, the act would have had neither more nor less validity had any other day been adopted."

Compare *Stanfeal* v. *State*, 78 Ohio St. 24, 84 N. E. 419, 14 Ann. Cas. 138. And see 38 Ohio Jurisprudence 349, Section 10.

Appendix "A"

It is to be noted that excepted from the operation of the statute in issue is "work of necessity or charity." Obviously, no fixed and unvarying definition of "necessity" as used in the statute can be given. That term is an elastic one. Certainly, it does not mean that which is wholly indispensable, but it does mean something more than that which is merely needful, desirable or convenient. For example, it is hardly a necessity to open a place of business on Sunday to make available to a purchaser an article which in the exercise of reasonable foresight he could have bought on a preceding day. To escape the inhibitions of the statute, labor performed or work done must come within the statutory exceptions, and whether it does is ordinarily a question of fact largely dependent on the circumstances surrounding the particular case. In the cases before us, all the lower courts determined that the element of necessity was lacking and we find no sufficient reason for overturning those determinations.

Another argument made is that Section 3773.24, Revised Code, is unconstitutional because it is a law for the promulgation of religious beliefs. True, that section by its terms is not applicable to "persons who conscientiously observe the seventh day of the week as the Sabbath, *and abstain thereon from doing things prohibited on Sunday.*" However, the evidence in these cases under consideration does not disclose that the business places involved closed on *any* day of the week in the observance of a religious belief or for any other reason, and, therefore, the defendants are hardly in a position to attack the statute on the constitutional grounds asserted. *Humphrey Chevrolet, Inc.* v. *City of Evanston*, 7 Ill. (2d) 402, 131 N. E. (2d) 70; *State* v. *Grabinski*, 33 Wash. (2d) 603, 206 P. (2d) 1022. But to face the problem squarely, we entertain the view, in line

with former decisions of this court already referred to and with those of other courts which have interpreted statutes similar to Section 3773.24, Revised Code, that such section does not represent a measure to enforce or promulgate religous observances.

The further argument is made that Section 3773.24, Revised Code, has been so undermined by exceptions that it is no longer sustainable. Our attention is directed to the laws which permit the sale of intoxicating liquors until 2:30 a.m. on Sundays and the sale of beer on that day having an alcoholic content of no more than 3.2 per cent, to those which sanction the playing of baseball games and the exhibition of motion pictures after noon on Sundays, to those which sanction trapshooting on Sunday afternoons when conducted under the auspices of a recognized club, and to others which sanction Sunday activities of a secular nature. It is claimed that these exceptions operate in such a discriminatory was as to nullify Section 3773.24, Revised Code, and that such section constitutes a denial of the equal protection of the laws and represents class legislation.

Contentions of that sort are not new and have frequently been rejected. Sunday observance laws are in force in most of the states, and generally certain activities have been excepted from their coverage. These Sunday laws are sustained quite uniformly upon the theory that the selection of subjects for exemption is peculiarly a matter of legislative discretion. Fundamentally, discrimination is the very essence of classification and is not objectionable unless founded on distinctions which the courts are compelled to pronounce unreasonable or purely fictitious.

The holdings of probably a majority of the courts are that the lawmaking department of a state has the constitutional power to make classifications and selections of what

should or should not be prohibited on Sunday, so long as those classifications are not arbitrary, capricious or unreasonable and so long as they do not discriminate among the same classes or kinds of pursuits. See annotations, 46 A. L. R. 290, and 119 A. L. R. 752. For its reasoning, attention is directed to the case of *Gundaker Central Motors, Inc.* v. *Gassert, Jr., Dir.*, 23 N. J. 71, 127 A. (2d) 566 (appeal dismissed for want of a substantial federal question, 354 U. S. 933, 1 L. Ed. (2d) 1533, 77 S. Ct. 1397). If, for instance, a law enforcement agency should invoke Section 3773.24, Revised Code, with respect to a football game played after noon on Sunday, the legality of such action might well be challenged, in face of the statute which permits Sunday baseball. See *Carr* v. *State*, 175 Ind. 241, 93 N. E. 1071, 32 L. R. A. (N. S.) 1190, holding the exemption of the game of baseball from the Sunday law a valid enactment, and see annotation, 24 A. L. R. (2d) 813. At least one court has held that engaging in a sport, specifically baseball, does not constitute "labor" within the prohibition of a Sunday law. *Territory of New Mexico* v. *Davenport*, 17 N. M. 214, 124 P. 795, 41 L. R. A. (N. S.) 407.

Some of the defendants place reliance on the cases of *Olds* v. *Klotz*, 131 Ohio St. 447, 3 N. E. (2d) 371, and *City of Cincinnati* v. *Correll*, 141 Ohio St. 535, 543, 49 N. E. (2d) 412, both of which had to do with municipal ordinances as distinguished from state laws. The ordinances involved in the cited cases fixed the hours on week days during which lawful business establishments might remain open, and this court held such ordinances to be unreasonable, arbitrary and discriminatory because they were opposed to basic freedoms and rights constitutionally guaranteed and constituted an unauthorized exercise of the police power, since

they bore no real and substantial relation to the health, safety, morals or general welfare of the public.

In keeping with the above holdings, it is generally recognized that a municipality in the exercise of its police power may not impose limitations, burdens and restrictions which impair the right to conduct lawful businesses, where the elements of public health, morals or safety are lacking.

In contrast, Section 34, Article II of the Constitution of Ohio, reads:

> "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the Constitution shall impair or limit this power."

Section 3773.24, Revised Code, is an enactment adopted by the General Assembly, is operative throughout the entire state and sets aside a specifically designated day of each week for the cessation of secular activities. Independent of the quoted constitutional provision, wisdom and common experience have long demonstrated that one full day of rest in seven is essential to the well being of all individuals, and that its observance does have a vital bearing on the health, safety, morals and general welfare of the citizenry.

We think the *Klotz* and *Correll* cases are clearly distinguishable from the instant ones, and that those cases are in no way decisive here.

As a part of his inaugural address delivered on March 4, 1869, President Ulysses S. Grant said:

"I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent enforcement."

Whether in this fast-moving modern age the Sunday closing law is outmoded, obsolete and unrealistic and

should be eradicated is essentially a legislative and not a judicial problem. Of course, the recognition and enforcement of the law depend largely upon the sentiment in a locality and the attitude of the law enforcement agencies of that community. But the fact remains that, even though such law may be inappropriate to existing conditions, it is on the statute books as a living piece of legislation, and there are many who would strenuously oppose its repeal. See *State* v. *Cranston,* 59 Idaho 561, 85 P. (2d) 682.

Various counsel attack the legality of the convictions of the defendants on other grounds, including the claim that the evidence adduced is insufficient to sustain the convictions. We have examined these contentions and find them without substantial merit.

In our opinion, no good or adequate reasons are discernible for reversing the judgments of the Courts of Appeals in the several causes under review, and they are, accordingly, affirmed.

Judgments affirmed.

WEYGANDT, C. J., STEWART, TAFT, MATTHIAS, BELL and HERBERT, JJ., concur.

TAFT, J., concurring. In my opinion, the strongest arguments, advanced in these cases against validity of the Sunday closing law, were those based upon the decisions of this court in *Olds* v. *Klotz,* 131 Ohio St. 447, 3 N. E. (2d) 371, and *City of Cincinnati* v. *Correll,* 141 Ohio St. 535, 49 N. E. (2d) 412. To paraphrase what was said by Bell, J., in his opinion in the latter case (page 542), almost every statement made in declaring invalid the legislation involved in those cases would be equally applicable in declaring the Sunday closing law invalid.

Appendix "A"

The legislation in the *Klotz* case made "it unlawful to maintain and operate a retail food and grocery establishment, open to the public for business except as between the hours of 7 a.m. and 7:30 p.m. on Monday, Tuesday, Wednesday, Thursday and Friday" but did permit operations from 7 a.m. to 9 p.m. on Saturdays and any day preceding a holiday (131 Ohio St. 450). The legislation in the *Correll* case made "it unlawful . . . to permit a barber shop to be open for . . . business . . . other than upon the days of the week and the hours of the day set forth" which were quite similar to those specified in the Klotz legislation.

It may be argued that Section 34 of Article II of the Ohio Constitution, which states that "laws may be passed fixing and regulating the hours of labor," will support the Sunday closing law although it would not support the ordinances involved in the *Klotz* and *Correll* cases. See dissenting opinion of Jones, J., in *Wilson* v. *City of Zanesville*, 130 Ohio St. 286, 199 N. E. 187. However, paragraph one of the syllabus in the *Klotz* case specifically states that the ordinance there involved was "not a valid exercise of the police power" and was "in contravention of the due process clause of the Fourteenth Amendment to the federal Constitution." Hence, this distinction of the *Klotz* case cannot be adopted without overruling in part paragraph one of its syllabus. Also, the decision in the *Correll* case, when read in the light of its syllabus, clearly indicates a conclusion by the majority of the court in that case that the legislation there involved was invalid because it bore no "real and substantial relation to the health, safety, morals or general welfare of the public."

Legislation, requiring the closing of a "place of transaction of business" during the daytime, as does the Sunday closing law, would quite clearly appear to have a less

"real" or "substantial relation to the health, safety, morals or general welfare of the public" than would legislation requiring such a closing during the nighttime, as did the ordinances in the *Klotz* and *Correll* cases.

However, probably the real distinction between the holdings of this court in the *Klotz* and *Correll* cases and its holdings in the instant cases is the extent of the "closing" required by the ordinances involved in those cases as compared with the extent of the closing required under the Sunday closing law. Under those ordinances, the establishments involved had to be closed not only on Sunday, as under the Sunday closing law, but also during a very substantial number of the hours of each of the other days of the week. In other words, the ordinances went much farther in providing for what is referred to in the quotation in the majority opinion from Minshall, J., as "periods of rest" than did the Sunday closing law. Thus, although a legislative provision for "periods of rest" may have some "real and substantial relation to the health, safety, morals or general welfare of the public" and hence represent a valid exercise of the police power, there are limitations beyond which it cannot go in providing for such "periods of rest" without becoming unreasonable and hence an invalid exercise of the police power.

APPENDIX "B"

A copy of opinions of the Court of Appeals for the First Appellate District of Ohio as furnished counsel is attached as Appendix "B." Concomitant opinion referred to in opinion in this cause is furnished. It has been reported in 143 N. E. (2d) 849, 105 Ohio App. 546.

Appendix "B"

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

Nos. 8231, 8232

HAMILTON COUNTY, No. 8231
STATE OF OHIO,

Plaintiff-Appellee,

v.

WILLIAM KIDD,

Defendant-Appellant.

HAMILTON COUNTY, No. 8232
STATE OF OHIO,

Plaintiff-Appellee,

v

BARBARA MILLS,

Defendant-Appellant.

OPINION

April 29, 1957

APPEALS ON QUESTIONS OF LAW FROM THE MUNICIPAL COURT OF CINCINNATI, OHIO

Mr. Allen Brown, attorney for William Kidd and Barbara Mills.
Mr. Lyle M. Castle for State of Ohio.
Messrs. Smith & Latimer, Amici Curiae.

Appendix "B"

BY THE COURT

An examination of the record discloses no error, prejudicial to appellants. The judgments are, therefore, affirmed. See: Cases Nos. 1081 and 1082, Butler County, *State* v. *Ullner,* announced concomitantly herewith.

HILDEBRANDT, P. J., MATTHEWS & LONG, J. J., concur.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO

Nos. 1081, 1082

BUTLER COUNTY, Nos. 1081 and 1082
STATE OF OHIO,

Plaintiff-Appellee,

v.

COLEMAN ULLNER,

Defendant-Appellant.

OPINION

April 27, 1957

APPEALS ON QUESTIONS OF LAW FROM COURT OF COMMON PLEAS, BUTLER COUNTY, OHIO

MR. JOHN W. THOMAS, Hamilton, Ohio, for Plaintiff-Appellee.

MESSRS. PAXTON & SEASONGOOD, MR. ROBERT P. GOLDMAN and MR. REUVEN J. KATZ, Cincinnati, Ohio, and MR.

Appendix "B"

EDWIN B. PIERCE, Hamilton, Ohio, for Defendant-Appellant.

BUTLER COUNTY, Nos. 1081 and 1082

MATTHEWS, J.

These two appeals from judgments of affirmance by the Court of Common Pleas of convictions of the appellant by the Municipal Court of the City of Hamilton, Ohio, for violation of Section 3773.24, Revised Code, are considered together.

There were two affidavits filed against the defendant. In one, he was charged with unlawfully opening, or causing to be opened a building or place for the transaction of business on a designated Sunday. In the other affidavit, he was charged with requiring a person in his employ, or under his control, to engage in common labor on a designated Sunday.

The first error assigned is, that the complaint fails to allege knowledge or intent to violate the law and, therefore, fails to charge an offense. *Daugherty* v. *Village of Dennison*, 11 C. C. (N.S.) 13, and *Goldsmith* v. *State*, 13 C. C. (N.S.) 148, and *City of Toledo* v. *Kohlhofer*, 96 Ohio App. 355, are cited in support of that contention. As to the first two cases, we think it sufficient to say that they were decided long prior to the enactment of the Code of Criminal Procedure Act, of which Section 2941.05, Revised Code, is a part, which expressly provides that it is sufficient for an information or indictment to be in the words of the statute defining the offense. The affidavits in these cases answer that test. As to the last case (*Kohlhofer*) we find it entirely dissimilar. To start with, in that case, unlike the affidavit in these cases, there was no aver-

ment that the act had been done unlawfully. Next, the character of the act was equivocal, per se. It could be done lawfully. It became unlawful only when done knowingly and with purpose or intent. In the cases at bar, the acts could not be done within the law, no matter what the purpose, except in the instances set forth in the statute itself.

Next, it is urged that there is a failure of proof that the defendant-appellant opened the place for the transaction of business in the one instance, and in the other instance required the employee to perform common labor on Sunday. As this contention required a consideration of the evidence, we have read the bill of exceptions and have concluded that this contention is without merit.

The evidence shows that on the Sunday in question, what seems to have been a rather large business establishment was being openly and actively operated. There was a corps of clerks serving many customers. It is not denied that the business was being operated and that it violated the terms of Section 3773.24, Revised Code. But, it is asserted that there is a failure of proof as to who was there at the beginning of business on that Sunday, and who employed those engaged and required the employees to perform the labor on that Sunday.

It seems to us that this dilemma is more apparent than real.

The evidence shows that this store was being operated by a family corporation. There were only three stockholders—two brothers and a sister, and all were actively engaged in this business. These three, either in person or through their agents, did these things. The defendant was present in the store at the time.

Appendix "B"

When we consider that those engaged in a common enterprise are each responsible for the acts of one another in pursuance of the common enterprise, and we further consider that under the law of Ohio (Sec. 1.17, R. C.) aiders and abettors are criminally liable and may be charged as principals, the speciousness of the contention is made manifest.

Finally, the broad contention is made that Section 3773.24, Revised Code, infringes freedom of religion and, therefore, violates both the State and Federal constitutions. It is said that recent decisions of the Supreme Court of the United States have broadened the "due process" clause of the XIV Amendment of the United States Constitution, so that it now includes all of the first ten amendments of that instrument as limitations upon the power of the states, and that this requires a reconsideration and re-appraisal of those Ohio cases sustaining this law (*State* v. *Powell,* 58 Ohio St. 324 et al.) in the light of these later decisions of the Supreme Court of the United States.

We fail to see the necessity for this re-appraisal. During the entire life of the State of Ohio, its Constitution has withheld from the legislature the power to pass any law that established any religion or prevented any person from worshiping his God according to the dictates of his own conscience. Placing a double guard—federal as well as state, if such is the case—neither strengthens or weakens the prohibition.

Whether we consider the question in relation to the State constitution or the Federal constitution, or both, it remains the same, and that is, whether designating Sunday as the day of rest is a violation of the freedom of religion guaranteed by the constitution, or any other constitutional right.

Appendix "B"

That a State in the exercise of its police power has a right to make some regulation of work and rest is conceded. That such a power exists has been recognized since the beginning of history. And in our Country, we say it is a part of that power to make all manner of laws having a reasonable relation to the health, morals, safety, general welfare and general prosperity. They are just objects of government and so long as the specific law has a reasonable relation to one or more or those objects, and operates uniformly on all similarly situated, whether the law shall be enacted is a matter of policy for the legislature to determine, and with which the courts are not concerned. And no constitutional limitation restricts the exercise of such power. This law was passed in the exercise of that power and the exception to the general prohibition cannot be said to have no reasonable basis.

But it is said that while requiring the observance of one day out of seven as a day of rest is a valid exercise of the police power, that power does not authorize the fixing of a specific day of the week as a day of rest, particularly when the specific day happens to be the day designated by the religion of the majority of the citizens as a day of rest, such as the Christian Sabbath. It is difficult—we think impossible—to make even a convincing argument that such a law has any relation whatsoever to religion, that is, anything to do with man's relation to his God. It requires nothing. It imposes nothing. It dictates nothing. It leaves him completely free to choose his religion and practice it without let or hindrance.

If designating a specific week day as the day of rest is beyond the power of the legislature, it must be for some other reason. We do not think that the legislature is required to assign a reason for fixing a specific day, rather

than leaving it to individual choice. We think valid reasons could be stated. In passing legislation, it is a proper object to consider the ease or difficulty of enforcement. Now, certainly the power to enforce a day of rest would be much easier than to enforce a day of rest selected by the individual. It would seem that the latter would not only be difficult, but in fact impossible to enforce. And the fact that a large group is already observing a specific day would be a proper thing to consider, and the selection of that for that reason would not interfere with anyone's freedom of religion.

For these reasons, the judgments are affirmed.

HILDEBRANDT, P. J., & LONG, J., concur.

APPENDIX "C"

Sections 3773.23 through 3773.26 and pertinent excerpts from Sections 3773.99 and 4301.22, Ohio Revised Code, are reprinted hereafter:

Ohio Revised Code, Section 3773.23

No person shall, on Sunday, participate in or exhibit to the public with or without charge for admittance, in a building, room, ground, garden, or other place, a theatrical or dramatic performance or an equestrian or circus performance of jugglers, acrobats, rope dancing, or sparring exhibition, variety show, negro minstrelsy, living statuary, ballooning, baseball playing in the forenoon, or exhibition of motion pictures in the forenoon. No person shall participate in keeping a low or disorderly house or resort, or sell, dispose of, or give away ale, beer, porter, or spiritous

liquor in a building appendant or adjacent thereto, where such show, performance, or exhibition is given, or house or place is kept. Complaint must be filed under this section within twenty days after a violation thereof.

Ohio Revised Code, Section 3773.24

No person who is over fourteen years of age shall engage in common labor or open or cause to be opened, a building or place for transaction of business, or require a person in his employ or under his control to engage in common labor on Sunday. In prosecutions under this section complaints shall be made within ten days after a violation.

This section does not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the Sabbath, and abstain thereon from doing things prohibited on Sunday.

This section does not prevent emigrating families from traveling, watermen from landing their passengers, or keepers of toll bridges, tollgates, or ferries from attending them on Sunday.

Ohio Revised Code, Section 3773.25

No person over fourteen years of age shall engage in sporting, rioting, quarreling, hunting, fishing, or shooting on Sunday. Complaint must be filed under this section within ten days after a violation thereof.

Ohio Revised Code, Section 3773.26

No person shall, in the open air on Sunday, have implements for hunting or shooting with intention to use them for that purpose. The use of hunting implements in trapshooting on Sunday afternoons when conducted

under the auspices of a recognized hunt, trapshooting, rifle, or game club of this state, is permitted.

Ohio Revised Code, Section 3773.99

. . .

(O) Whoever violates section 3773.23 of the Revised Code shall be fined not more than one hundred dollars or imprisoned not more than six months, or both.

(P) Whoever violates section 3773.24 of the Revised Code shall be fined twenty-five dollars for a first offense; for each subsequent offense such person shall be fined not less than fifty nor more than one hundred dollars and imprisoned not less than five nor more than thirty days.

(Q) Whoever violates section 3773.25 of the Revised Code shall be fined not more than twenty dollars or imprisoned not more than twenty days, or both.

(R) Whoever violates section 3773.26 of the Revised Code shall be fined not less than twenty-five nor more than two hundred dollars.

Ohio Revised Code, Section 4301.22

Restrictions on sales of beer and intoxicating liquor.

Sales of beer and intoxicating liquor under all classes of permits and from state liquor stores are subject to the following restrictions, in addition to those imposed by the rules, regulations, or orders of the department of liquor control.

. . .

(D) No sales of intoxicating liquor shall be made after two-thirty A.M. on Sunday or on election day between the hours of six A.M. and seven-thirty P.M.

. . .

APPENDIX "D"

Copy of Judgment Entry of Supreme Court of Ohio

Appears in Journal 42, page 563 of the Supreme Court of Ohio and page 26 of Transcript of Record certified to Supreme Court of United States. Entered April 30, 1958.

Nos. 35215, 35216

STATE OF OHIO,

Plaintiff-Appellee,

v.

WILLIAM KIDD,

Defendant-Appellant.

STATE OF OHIO,

Plaintiff-Appellee,

v.

BARBARA MILLS,

Defendant-Appellant.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Hamilton County and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby affirmed; and it appearing to the Court that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended, taxed at $————.

ORDERED, that a special mandate be sent to the Court of Common Pleas of Hamilton County, to carry this Judgment into execution.

Appendix "E"

ORDERED, that a copy of this entry be certified to the Clerk of the Court of Appeals of Hamilton County "for entry."

APPENDIX "E"

Copy of Entry of Supreme Court of Ohio Denying Application for Rehearing

Appears in Journal 42, page 580 of the Supreme Court of Ohio and page 26 of Transcript of Record certified to Supreme Court of United States. Entered May 21, 1958.

Nos. 35215, 35216

STATE OF OHIO,

Plaintiff-Appellee,

v.

WILLIAM KIDD,

Defendant-Appellant.

STATE OF OHIO,

Plaintiff-Appellee,

v.

BARBARA MILLS,

Defendant-Appellant.

APPLICATION FOR REHEARING

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

APPENDIX "F"

Copy of Notice of Appeal to the Supreme Court of the United States

Filed July 15, 1958

IN THE SUPREME COURT OF OHIO

Nos. 35215, 35216 (Consolidated)

STATE OF OHIO,

Plaintiff-Appellee,

v.

WILLIAM KIDD,

Defendant-Appellant.

STATE OF OHIO,

Plaintiff-Appellee,

v.

BARBARA MILLS,

Defendant-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

---

1. Defendants-appellants William Kidd and Barbara Mills, in the within consolidated cause, do hereby appeal to the Supreme Court of United States from the final order of the Supreme Court of Ohio dated May 21, 1958, denying the Application for Rehearing of said Court's decision of April 30, 1958, in which said Court affirmed the judgment of conviction by the Municipal Court of Cincinnati, which

was affirmed by the Court of Appeals for the First Judicial District of Ohio. Said appeal is carried forward in such consolidated form as if this were a single cause.

This appeal is taken pursuant to 28 United States Code Annotated 1257 (2).

Appellants were convicted of violation of Section 3773.24, Ohio Revised Code, commonly called the Sunday Closing or Sabbath Desecration Law, for respectively as above captioned opening a grocery store on September 30, 1956, a Sunday, and engaging in common labor, to-wit: grocery store clerk, on Sunday, and were sentenced to pay a fine of ten dollars and court costs for Kidd and court costs for Mills. Stay of execution bond was allowed and posted in the sum of $100.00 each, which bond by entry of this Court is still in force and effect and is to remain in effect pending disposition of this appeal hereby initiated. The Court is petitioned to make any further order with respect to appeal bond to be given by said defendants if further supersedeas is desired.

2. The clerk will please prepare a transcript of all the proceedings in the Supreme Court of Ohio in this cause, including the full proceedings of all lower courts certified to said Supreme Court, and include, though not limited to, in said transcripts the following:

Affidavits from Municipal Court of Cincinnati.

Motion to quash affidavits, plea in abatement of affidavits and demurrer to affidavits in Municipal Court of Cincinnati.

Bill of exceptions from Municipal Court of Cincinnati.

Motions for new trial and entries overruling the same from Municipal Court of Cincinnati.

Notice of Appeal and Assignments of Error, First Appellate District of Ohio.

Appendix "F"

Entry sustaining judgment of Municipal Court of Cincinnati by Court of Appeals, First Appellate District of Ohio.

Motion for rehearing, First Appellate District of Ohio, and entry overruling same.

All briefs and other notices, motions, documents and entries filed in this Court.

3. Appellants adopt for their statement of points upon which they intend to rely in their appeal to the Supreme Court of the United States points contained upon constitutional grounds in their assignments of error heretofore filed, by reason whereof the following questions are presented for appeal:

1. Whether Section 3773.24, Ohio Revised Code, under which the appellants were convicted and which is commonly called the Sunday Closing or Sabbath Desecration law, which forbids any form of common labor or the mere opening of a place for transaction of any business on Sunday except for work of necessity or charity, exempting persons "who conscientiously observe the seventh day of the week as the Sabbath, and abstain thereon from doing things prohibited on Sunday" is unconstitutional because it is a law respecting the establishment of religion, aids certain religions over others, imposes a mode of religion and religious observance upon all, establishes religious criteria of "rest" and conduct and exemption from conduct, prohibits the free exercise of religion, and prohibits the right of the people peaceably to assemble?

2. Whether Section 3773.24, Ohio Revised Code, is unconstitutional in that it abridges the privileges and immunities of citizens of the United States, and deprives the accused of life, liberty and property, without due process of law in that it is an unwarranted and arbitrary

interference by the legislative body neither justified nor logical under the police power, depriving the appellants of property rights and their privileges and immunities, and is so broad in restraint on private rights, as to be basically absurd on its face, and has been in fact accorded partially with reality only on the basis of unstandardized administrative discretion and lassitude?

3. Whether Section 3773.24, Ohio Revised Code, is unconstitutional in violation of due process of law as a criminal statute in that it is so vague and indefinite on its face and as interpreted by the Supreme Court of Ohio—"the word, 'necessity,' is an elastic one"—that men of common intelligence must guess at its meaning and differ as to its application and because it pits the judgment of the accused against the judgment of a judge or jury at peril of criminal conviction?

4. Whether Section 3773.24, Ohio Revised Code, is unconstitutional in that it alone and in conjunction with other Ohio legislation and as interpreted by the Courts and administrative officers of Ohio denies the equal protection of the law and is discriminatory against the appellants?

5. Whether the consistent mode of administration of Section 3773.24, Ohio Revised Code, and the mode of administration of Section 3773.24, Ohio Revised Code, in direct relation to the appellants and the mode of arrest and prosecution of the defendants in this particular action were so manifestly unfair and unequal that a violation of due process of law and equal protection of the law arises; whether the trial court denied constitutional privileges and defenses to the appellants by refusing to allow the introduction of evidence on that consistent mode of administration, by refusing clarification of the affidavits so that

the accused were truly informed of the nature or cause of the accusation, and by prejudice and predetermination so obvious as to obviate due process of law.

/s/ ALLEN BROWN,
Counsel for Defendants-Appellants.

Receipt of Notice

July 14, 1958

This is to acknowledge receipt of the above Notice of Appeal.

/s/ LYLE W. CASTLE & ROBERT PAUL,
Counsel for Plaintiff-Appellee.

APPENDIX "G"

In order to emphasize the national scope of the issues raised in this cause, the following excerpt from *Time*, the weekly news magazine, is reprinted herein. This article chosen at random from an extensive bibliography on the question, serves as exemplar that the problem is not merely local, that sociological changes affecting the definition of the word "necessity" are involved, and that the Supreme Court of Ohio by its "elastic" definition of necessity has pitted the economic and sociological judgment of the tried against that of his triers.

(Excerpt from *Time*, the Weekly News Magazine, October 22, 1956, Vol. LXVIII, No. 17, page 98)

SUNDAY SELLING
A NEW SERVICE RAISES A HOT DISPUTE

When a New Jersey clothing chain opened a new branch at Union Township one day this month, 20,000 first-day

shoppers from a 30-mile radius jammed highway 22 for four solid miles. Main reason for the stampede: the store opened on a Sunday, thus permitting entire families to do their shopping together. Such booming Sabbath business has become a nationwide phenomenon—and one of the hottest controversies in U. S. retailing.

From New Orleans' Schwegmann supermarket (whose bar dispenses brand-name liquor for 30¢ a shot on Sunday) to Los Angeles' $6,000,000.00-a-year, 24-hour-a-day Ranch Market, grocery stores now find that Sunday is the third biggest day of the week (after Saturday and Friday). As supermarket stocks have expanded in postwar years to include goods ranging from shovels to shotgun shells, discount houses, clothing stores, furniture and appliance dealers have turned to Sunday selling. Many department stores even hold "Sunday special" sales. For auto dealers, Sunday trade often amounts to 50% of total weekly sales. Even in Mormon Salt Lake City and Baptist Atlanta, where the Sabbath is scrupulously observed, real estate agents say that Sunday is still the heaviest day of the week by far.

In Milwaukee, Seattle and New Orleans, the Sunday Boom has spurred vigorous counteroffenses by merchants' associations, which resist Sunday selling as an unfair pressure on the businessman. Church groups have joined in the criticism. Decrying "this insidious and fast-growing practice," Cardinal Spellman last month urged New York's Roman Catholics to "help others who wittingly or unwittingly may be breaking God's Third Commandment," by refusing to do Sunday buying.

The great majority of retailers contend that seven-day selling is indefensible in the face of nationwide pressure for a four-day week. While small businessmen say they

are forced to open Sundays to meet low-margin chainstore competition, many chain operators have found that Sunday volume has become too big to jettison. A big Arkansas supermarket operator who returned to the six-day week found that receipts dropped 40%. In Indianapolis after agreeing to close on Sundays, the Kroger chain was forced to reopen nine of its 16 markets.

Determined attempts by businessmen to keep store doors locked on Sundays have proved ineffectual in most areas. In Los Angeles, where Sunday shoppers come from towns 50 miles away, more than 95% of auto dealers approached by a trade association agreed recently to observe a six-day week. While some 85% have kept the pledge, five of the city's 31 Buick dealers have already reopened Sundays. Union efforts to give members their traditional day of rest have also boomeranged. Merchants take punitive wage costs in stride while union members vie eagerly for double time Sunday duty.

Although 38 states have laws banning nonessential Sunday work, the laws in most cases are antiquated, vague, unenforced or unenforceable. In Arkansas, Colorado and Michigan, blue laws have either been ruled unconstitutional or are under appeal. In New York, an accountant who was arrested last January for working on Sunday was acquitted by a judge who pointed out that baseball stadiums and theaters have long violated the Sabbath with impunity. In many cities where Sunday-closing ordinances are enforced, merchants sidestep the law by selling from branches outside city limits. Rather than turn away customers, businessmen in such cities as Newark and Little Rock, Ark. have repeatedly paid fines and continued to cater to Sunday trade.

Appendix "G"

Critics of the blue laws argue that they ignore a profound shift in U. S. living and shopping habits. In an era of full employment, many husbands and wives both hold jobs, find it impractical to shop on weekdays. Moreover, merchants who try to solve the problem by keeping late weekday hours report that most customers prefer to shop (and invariably spend more) on Sunday, when they can take their time and bring the family. With the exodus to the suburbs and the growth of one-stop shopping centers (TIME, Oct. 15) in outlying areas, families have become accustomed to shopping by car. Says a Cleveland housewife: "Getting up late Sunday and shopping with the kids after a slow breakfast is fun. It's like going to the fair."

Thus many retailers genuinely feel that Sunday service, however burdensome, is a necessary and legitimate response to consumer needs. In Chicago, Courtesy Motor Sales President Jim ("World's Largest Ford Dealer") Moran, a Roman Catholic, relies on Sunday deals for 25% of his weekly volume. Says Moran: "It's no sin. As long as saloons are open on Sunday, I don't see anything wrong with selling automobiles."

APPENDIX "H"

Excerpts on constitutional issues from appellants' briefs before Supreme Court of Ohio:

• • • • • •

SUPREME COURT OF OHIO

Nos. 35215, 35216

STATE OF OHIO,

Plaintiff-Appellee,

v.

WILLIAM KIDD,

Defendant-Appellant.

STATE OF OHIO,

Plaintiff-Appellee,

v.

BARBARA MILLS,

Defendant-Appellant.

BRIEF ON CONSTITUTIONAL ISSUES

APPEAL FROM THE FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO

• • • • • •

ARGUMENT

Proposition of Law One—O. R. C. 3773.24 is a law for the promulgation of religious beliefs and therefore un-

constitutional under the Constitution of the United States and the State of Ohio.

* * * * * *

In the last five years the Supreme Court of the United States has engaged in a serious reappraisal of police power. The Court has ceased to seek a rationale of police power for laws in which the legislative intent is in fact for other unconstitutional purposes. This is being done even where a vivid case for the exercise of police power can be made out, e.g. immediate danger of mob outbreak and threats to the peace and harmony of the established, though perhaps morally wrong, patterns of community conduct. (*Brown* v. *Board of Education,* 347 U. S. 483, *Kansas City* v. *Williams,* 205 F. 2d 47, certiorari denied 346 U. S. 826, *Beal* v. *Holcombe,* 193 F. 2d 384, certiorari denied 347 U. S. 974, etc.)

In the light of this reappraisal O. R. C. 3773.24 is subject to a reappraisal as well. The original passage of the act, its title under the General Code—from which the revised code effected no change in substance—"Sabbath Desecration," bespeak the legislative intent. The exemptive religious feature of the law for those who on religious grounds recognize the seventh day as a day of abstinence affirms rather than militates against this intent. It indicates that a religious aspect clings to Sunday, from which only another religion exempts. The very choice of a day of historical religious aspect, the surrounding statutory limitations as Sunday activity in the area of non-religious relaxation, the cutting athwart of practically all human temporal activity, the double specific of prevention on Sunday of matters otherwise subject to police power legislation all loudly bespeak the legislative intent.

Appendix "H"

A regularly recurring day of rest could be enjoined by other means than choosing the Lord's day. Other constitutional grounds, to be discussed in a few pages reflect upon the choice of a given day. At this point it is important only to point out that the so-called police purposes of the act could be more practically achieved, as they have been achieved in part in this jurisdiction and more extensively in other jurisdictions, by minimum wage and hour laws or similar legislation. A proper police exercise would be the passing of a formula of control of days and hours, but bearing an area of the exercise of discretion by the individual within the health aspects of the formula. The choice of Sunday, absolutely, for such purpose, cannot but reflect a religious interest rather than an interest in health and welfare. The excuse of ease of enforcement used by the Lower Court is a dangerous excuse at best for it precludes the necessary adaptability of human activity and commerce which would be entailed in true police legislation on the matter.

The argument is not to be misunderstood. The Court is not asked to rule on the practical wisdom of the afterthought of health and welfare aspects of the act read into it by courts or the effectiveness of methods used by the Legislature. Rather the proposition is that where legislation, obviously religious in historical and legislative context, is attempted to be justified as health and welfare, the inflexibility of the act, the impracticality of the act in relation to custom and usage not malum in se, and the practicalities of existence in both the 19th and 20th century, are reflective of the true legislative intent and justify the construction by the Court of religious intent only. In other words a slap-dash health and welfare act, simultaneously a clear cut religious act, may be considered for

what it truly is, an act for the promulgation of religious beliefs.

The exemptive feature concerning persons who conscientiously observe the seventh day of the week as the Sabbath points up the religious basis. Exoneration from the general Sabbath is granted only upon religious grounds. This creates a logical cul de sac. Either the entire law is religious or the exemptive feature is a special feature of the law extending special benefits to special religious groups and is itself an unconstitutional feature. If this appears absurd let us follow it to its conclusion.

In *Bellingheimer* v. *Ohio,* 32 O. S. 435, defendant was charged with operating a poolroom on Sunday. The defense was that he observed the Jewish sabbath by keeping his business closed Friday night to Saturday night. The Court, however, found that the defendant was very irregular in his observance, and that he did not "conscientiously observe the Sabbath." In two other cases, defendants who conscientiously observed the seventh day were held to be within the exception of the statute: In *Cincinnati* v. *Wright,* 15 O. R. 225; *Robbins* v. *Ohio,* 19 O. N. P. n.s. 606.

We now have the Courts of Ohio sitting on the quality of the conscientiousness of the individual defendant's religious observance. Is the court to become enmeshed perhaps in the rivaling theologies of Reform and Orthodox Judiasm? What is to become of those few Ohio Mohammedans who observe Friday Questions well up too numerous to list.

In the recent case of *Kedroff* v. *St. Nicholas Cathedral,* 97 Supreme Court Lawyer's Edition, page 95, the United States Supreme Court announced its opinion on November 24th, 1952, and in Syllabus 3 stated:

Appendix "H"

"The principles of the First Amendment regarding freedom of religion are made applicable to the states by the Fourteenth."

Proposition of Law Two—O. R. C. 3773.24 is unconstitutional as a criminal statute in that it is indefinite of definition and imposes a criminal penalty upon the exercise of judgment.

The statute under which the Defendants are charged is an unconstitutional statute in that it deprives the Defendants of rights without due process of law by creating a crime without setting up sufficient standards for that crime so as to give the person charged thereof a reasonable and predictable course of conduct which he can follow and escape the consequences of such statute. The use of the exceptional words "necessity" and "charity" in the statute give leave to vast areas of disagreement and understanding of the course of conduct required. . . . *Murray Winters versus the People of the State of New York* (333 U. S. 507) . . . was decided by the Supreme Court of the United States. In that case a defendant was charged with violation of an obscenity statute. The Supreme Court recognizing that the bald use of the word "obscenity" as a yardstick of crime forced upon the accused the onus of deciding within the mores of his time, the qualities of his conscience and the qualities of many differently constructed people and other intangible factors, the determination of whether that in which he was dealing was obscene. So, in the given case, there was thrown upon the accused the onus of deciding whether that which he is doing is necessary and charitable. Charity is a changing word. What constituted charity in the Middle Ages as against modern times is susceptible of differing definitions. What constitutes

charity in India might not be considered charity in Ohio. What constitutes charity in the mind of an individual who detests the poor but loves his God or in the mind of an individual who might be an atheist but have a warm feeling for his fellowman can be two very different things. Today, and every day, for the last fifty years, and tomorrow, and every day, for the next fifty years, there will be pending before courts of tax appeals, probate courts, and many other similar bodies, the difficult and sometimes nigh insoluable cases of what constitutes a charity. As to necessity, here the area of interpretation and disagreement widens even more. There is often official recognition that what constitutes necessity can vary from individual to individual, based upon their standard of living, their previous environmental conditions and similar matters. What constituted necessity when this act was passed and what constitutes necessity today are different. When this act was passed, standards of sanitation, freshness of perishables, and other matters were certainly not measured by the same standard of necessity that we measure them today or that we will measure them ten years hence. Further, necessity even in the most limited sense, that is urgent preservation of human life against situations of acute emergency is by its own definition a situation not foreseeable. Thus, in a given case, *A* may open his business at ten o'clock in the morning. With the strict definition of necessity, there may be no need for him to open the business. At eleven o'clock a situation of necessity could arise. At twelve o'clock the situation could be dissipated. To be specific, in the given case, an emigrating family might go into the store for the purpose of buying food for their emigration. Secondly, there might be a fire next door involving the necessity of providing safety to the de-

fendant's place of business. Thirdly, an infant suffering diarrhea, a situation of acute peril, might require an immediate change of formula. Is the accused, therefore, to stand by his door, key in hand, or may he within the purview of possible necessity open his door? Obviously, an impossible standard of conduct is charged by the statute and to be accused thereunder is to be deprived of one's right without due process of law. Further, in all business operations today there is a commingling of goods necessary and luxurious. Even the pharmacist deals in cosmetics, compacts, and comic books. When he opens his door to deal in his obviously necessary pharmaceuticals, may he generally deal or is he constrained to deal only in necessaries, and where in such latter instance shall he draw the line?

Further the statute itself bears other latent ambiguities. Nothing in it sets forth conducting a business as a crime, merely the opening of a building for the transaction of business is defined as a crime. Is the mere opening of an edifice normally used as a place of business a crime? It could be under the ambiguities of this statute. What is common labor? As my aching fingers write this brief I am sorely tested to determine where common labor leaves off and intellectual labor begins. Even under the strictest construction the statute poses an exercise of judgment upon the accused which violates his personal rights. We have a situation of necessity. A fire is raging on Sunday a block away from the place of business of Mr. X and Mr. Y. Cautious Mr. X calls upon his employees to help him move stock out immediately. Bolder and more optimistic Mr. Y waits until the fire is just three doors away. And both are deemed wrongdoers by stern Judge Z who says there was no true necessity until the bread in the store was toasting, and the roasts needed basting.

Appendix "II"

This is perhaps a treatment light in flavor. More frightening is just what would have been the situation during the war when practically all industry, including that not keyed to production of war materials, remained open 168 hours a week, and the long dormancy of this law had not been reawakened by specific pressure groups, or in any true situation where the viewpoint of timorous vs. bold, pacifist vs. militant, luxurious vs. spartan, modern vs. archaic, scientific vs. slovenly, could yield a difference in judgment.

A criminal statute, making a crime something not malum in se, so replete with ambiguities, and nuances of interpretation and judgment, is violative of due process of law, indeed the Sixth Amendment of the Constitution of the United States.

Proposition of Law Three—O. R. C. 3773.24 is unconstitutional in that it deprives the Defendant of rights without due process of law.

Presupposing the purpose of the Section of the Code is to regulate hours of employment, then we direct your attention to the recent decision by the Supreme Court in the case of *Olds* v. *Klotz*, 131 O. S. 447.

> "An ordinance limiting and fixing the hours per day during which a retail food and grocery establishment may be kept open for business with the public is not a valid exercise of the police power and is in contravention of the due process clause of the 14th Amendment to the Federal Constitution and the due course of law provision of Article 1, Section 16 of the Constitution of Ohio."
>
> * * *
>
> ". . . places for distribution of foodstuffs are wholly necessary in order to furnish daily nourishment to the masses of our people. Wisely, laws have been enacted to assure the purity and wholesomeness

of food; but the limitation of hours that products of that kind may be sold by retail to the public seems to be of minor consideration in relation to the public health in comparison with the necessity of having food available at the time it may be required to supply pressing human want. Food is vital to health, and even to life itself. Its need for nourishment to sick and well, to adult and child, is quite as pressing a consideration from a health standpoint, as that which requires that food be retailed in stores under conditions which are consonant with proper requirements of sanitation. All the authorities seem to be in accord with the proposition that the police power does not extend to the limitation of hours within which retail stores, selling either groceries or other commodities or both, may be kept open to customers. (Appellant's note—Appropos of the motion to certify and companion brief hereto the Court seems almost to be commenting favorably upon the defensive evidence adduced by the Appellants in the Lower Court.) Every business has some relation to the general welfare, because there is none which is operated to supply consumers generally that does not have some public aspect; but the regulation thereof is not within the police power unless the relation to the public interest and the common good is substantial and the terms of the law or ordinance are reasonable and not arbitrary in character."

Here then we have a law which makes a midget of the Toledo ordinance struck down by the *Olds* case. It forbid all form of commercial dealings on Sunday. It stops presses (today the radio will give us the news), radio and television, (only "necessary," whatever that is, communication required) gasoline stations (under the foresight doctrine one could have filled up Saturday night and even carried a couple of extra containers. *Schlicht* v. *Ohio,* 8 O. N. P. n.s. 265), groceries (the case in question), restaurants (is it necessary to eat out? Even if you are a hotel

resident a can of beans, a loaf of bread, a jug of wine and a book of verse, all purchased on Saturday, are all that are necessary to sustain life), etc., beyond the imagination. If I appear frivolous, perhaps the basic absurdity of the law rather than my own waggishness is at fault. How in the infinite variety of human needs, their hourly changing and varying degree, the unforseeable, the inopportune, can we drag a given day away from human intercourse. Police power might prescribe one day in every seven for rest. It cannot arbitrarily choose any one of the seven.

Proposition of Law Four—O. R. C. 3773.24 is unconstitutional in that it alone and in conjunction with other legislation denies the equal protection of the law.

In *City of Cincinnati* v. *Correll,* 141 O. S. 535 at page 540 we find the following:

> "We realize that the police power is elastic to meet changing conditions and changing needs yet it cannot be used to abrogate or limit personal liberty or property rights contrary to constitutional sanction."

Any exercise of police power must apply equally to all citizens and all classes of citizen. Note has already been made of the unfortunate situation of Ohio Mohammedans under O. R. C. 3773.24. Further the statute for some reason exempts all persons under fourteen years of age. Since the rationale of the law is health and morals there is no reason for the distinction, and a class is created. Nextly, Section 4301.22 of the Revised Code, a later expression by the legislature, allows liquor bars to sell intoxicating liquors until 2:30 A. M. on Sunday. Another place of business cannot remain open after midnight on Saturday, under O. R. C. 3773.24, and yet a bar can remain open until 2:30 on Sunday morning, indeed is even specifically licensed to do so. O. R. C. 3773.23 exempts from the after-

noon and evening of Sunday baseball, motion pictures, and certain other entertainment. Further O. R. C. 3773.24 itself makes certain unique exemptions and distinctions ferryboatmen, charity, necessity, emigrating families, etc. And in actual enforcement, administrative and judicial, a welter of interpretation of these exemptive features have arisen.

In the case of *City of Mt. Vernon* v. *Julian,* reported in 119 A. L. R., 747, the Court stated that where the exceptions from the operations of a Sunday closing ordinance were numerous, excepting hotels, restaurants, eating places, drug stores, tobacco stores, etc., that such exceptions render the Statute arbitrary and discriminatory, and therefore invalid as an exercise of police power. This statute, and subsequent legislation amending it in effect, as well as the judicial flounderings with its ambiguities, have made of it class legislation, unequal in its application to all classes of citizens.

Proposition of Law Five—The mode of arrest and prosecution in this matter deprived the Defendants of their rights without due process of law and subjected them to unequal protection of law.

The right to act under the law as it exists is vested in every citizen, and he may be deprived of the same only by due process of law. The question of how does the law exist. It exists both in the written body of constitutions and statutes, in the common law and interpretative rulings of written law of stare decisis, and finally it must be admitted it exists in the implied interpretative statements and action of the executive branch charged with its enforcement. It is in this latter aspect that we feel there has been a violation of due process of law and unequal enforcement of the law in relation to these Defendants.

Appendix "H"

Arrests, in the given case were made after a long period in which those charged with the enforcement of the law did not interfere with—in fact did actually cooperate with on occasion—the engagement of the pursuits similar to the specific pursuit with which the Defendants are charged on the day in question. The Defendants because of this long history had every right to assume that although a law may not be repealed by executive laxity in its enforcement the executive department was recognizing that their particular pursuit did not fall under or was a specific exception in the terms of the statute. For the executive department, for the arrests and affidavits here were not private but initiated by public officials, therefore to cause their arrest and charge as in the affidavits without prior warnings that the executive now deemed that their heretofore benevolently pursued occupation was no longer approved constituted deprivation of their rights, without due process and an improper charge of crime. Further, there is evidence from that the official ordering the arrest that the Defendants were arrsted at the behest of certain specific groups and individuals, that a specific list of some thirty names was presented to the police department of persons suggested as violators, that the police department acted upon this list but that they did not arrest all persons on the list or all persons engaged in business on the Sunday in question, that the police department made the arrests without any conviction as to whether those arrested were engaged in necessary or charitable activities but solely at the behest of those presenting the list and solely for the purpose of establishing "test cases." To single out any individual engaged in widespread practice and to throw upon that individual the onus of bearing the unfavorable publicity of an arrest, the expense and loss of time in defending the

same and the eeny-meeny-miny-mo singularity of being chosen from many hundred engaged in common and similar pursuits is an abuse of the administrative process and constitutes unequal enforcement of the law. The most cursory of investigations was made. No mode of distinction of those on the list arrested or not arrested was made. No administrative standard was established. A couple of arrests were just made. The executive is charged with acting by due process of law as well as the Legislature and Courts. In the circumstances proven here the absence of some public statement as to a changing or newly achieved definition of charity and necessity, the failure to order general police enforcement rather than the sending of just two detailed to the special, secret, and hit and miss purpose, and the failure to even attempt the creation of an administrative standard or yardstick under which the generalities of the act and its multiplicity and vagueness of exceptions could be made the subject of investigation, arrest and prosecution all bespeak lack of due process and unequal enforcement.

The trial of the Defendants was like something out of Alice-in-Wonderland. The record is replete with indications that before even opening statements the Court had closed its mind. Overwhelming evidence of necessity was submitted. To this, if the Court considered it at all, the Court replied that evidence of necessity was limited to the specific items of merchandise purchased by the police for effecting the cititation. . . . The trial was such as to cause a conviction of the Defendants without due process of law. The overruling of the motion to quash the affidavits constituted a violation of the Sixth Amendment to the United States Constitution.

• • • • • •

Appendix "H"

SUPREME COURT OF OHIO

Consolidated Appeal from the Court of Appeals of Hamilton County

---

Nos. 35215, 35216

STATE OF OHIO,

Plaintiff-Appellee,

v.

WILLIAM KIDD,

Defendant-Appellant.

STATE OF OHIO,

Plaintiff-Appellee,

v.

BARBARA MILLS,

Defendant-Appellant.

ADDITIONAL BRIEF OF DEFENDANTS-APPELLANTS ON MERITS

• • • • • •

A. Ohio Revised Code 3773.24 is unconstitutional in that it conflicts with Article I, Sections 2 and 7 of the Constitution of the State of Ohio and the First Amendment of the Constitution of the United States.

Appendix "H"

The doctrine of separation of church and state is unique in the American constitutional system. The Supreme Court of Ohio recognized the appropriate spheres of action of government and religion in the following significant words:

> "When Christianity asks the aid of government beyond mere impartial protection, it denies itself. Its laws are divine and not human. Its essential interest lies beyond the reach and range of human governments. United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated, the better it is for both." (*Board of Education of the City of Cincinnati* v. *Minor et al.*, 23 O. S. 211.)

In the Senate report on Sunday mails of January 18, 1829, the following language appears:

> "Among all the religious persecutions with which almost every page of modern history is stained, no victim ever suffered but for the violation of what government denominated the law of God. To prevent a similar train of evils in this country, the Constitution has wisely withheld from our government the power of defining the divine law."

Earlier, James Madison, in *Elliott's Debates on the Constitution,* 3, page 330, had declared:

> "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation."

In *Board of Education* v. *Barnette,* 319 U. S. 624, 639 (1943) the Supreme Court said:

Appendix "H"

> "The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a rational basis for adopting. But freedoms of speech and of press, of assembly, *and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.*" (Emphasis added)

A series of recent decisions, e.g. *McCollum* v. *Board of Education,* 333 U. S. 203 (1948); *United States* v. *Ballard,* 322 U. S. 78 (1944); *Murdoch* v. *Pennsylvania,* 319 U. S. 105 (1943); *Jones* v. *Opelika,* 319 U. S. 103 (1943) have affirmed the extreme scrupulousness with which the courts are constrained to apply the rule enunciated in the *Barnette* case. The nuances of potential public pressure upon a sensitive child or person to follow a given course of religious training are sufficient to doom a course of state action.

The obvious and constant equation between morality and religion makes of this primarily healthy doctrine of separation of church and state a difficult problem for the courts. The enforcement of rules of decency, which is the proper function of the state, must correlate and align the state in many instances with religion. However, this area of correlation must be constantly subjected to the scrutiny of the courts lest the doctrines of the church are, under the guise of morality, becoming the principles of the state. An obvious example of a law violative of religious freedom would be the passage by the State of Ohio of a law forbidding the sale of non-kosher meat in this State. There, the particular moral tenets of a particular body of a particular religion, righteous and theologically tenable as they

might be, would be incorporated as the action of the state and we would have a clear-cut entry into religious areas by government. An obverse and equally polar example is a statute forbidding murder, which correlates quite properly with the Commandment, "Thou shalt not kill." Here the ultimate interests of society and the interests of religion are one and the same and the promulgation of the law can be justified solely in the interest of society. It is in the area of legislation such as is being reviewed here that the difficulties of the problem become most evident.

I shall not dwell at length on the obvious historical religious aspects of this law. The history of the legislation is discussed in *State* v. *Powell,* 58 O. S. 324, especially in the synopsis of what must have been a scholarly appellant's brief in that case. Some of the earlier legislation, from which the present legislation derives, is quoted in Appendix H, and speaks for itself, casting a moral aura and equating Sunday labor with disorderly conduct. Even as late as just prior to the recent revision of the General Code the caption of the law read "Sabbath Desecration" (O. G. C. 13045) and the telltale use of the word sabbath remains in the statute to this date. Had the *Barnette* case been decided in 1898 before the *Powell* case, it is entirely conceivable the Supreme Court of Ohio would have decided that latter case differently. The tack taken by the Court of finding some public rationale for a law, in itself and historically becrying religious legislative intent, as the Court almost admitted, was not justifying the law under a "grave and immediate danger to interests which the state may lawfully protect."

However, assuming that the *Barnette* and *McCollum* and similar cases have not achieved a new constitutional approach to law supporting a religious principle, and we are

constrained by a more lax rule that religious intent would not in and of itself be fatal if a sound and proper basis of determining that the law was passed in the interests of general society can be found, it still follows that this law must fall. Faced with its obvious historical purpose the courts have for many years floundered in an effort to find a basis of public interest. The weakest of the excuses appears in such a case as *Brackett* v. *Edgerton*, 14 Minnesota 134: "The law is . . . to prevent a desecration of the day." Here the effort of justification flops right back to the support of religion. The strongest of the excuses is, as was stated in *State* v. *Powell*, 58 O. S. 324, which found that the interests of society are served by prescribing a regularly recurring day of rest.

However, any rationale to be valid must fulfill the most simple requirement of an exercise of police power in a system of government delimited by constitutional safeguards. It must be reasonable and not arbitrary in character, and must be designed to fit the ostensible purpose it is to serve. Here is where *State* v. *Powell* failed. It found an excuse. Universal and regularly recurring rest is good for the common well-being—and it stopped there. But this law is not reasonably or truly designed to achieve that purpose. It is designed to protect Sunday, not the public's rest. This law, which must be interpreted, along with its sister legislation forbidding almost all forms of recreation, forbidding even the cutting of one's own grass on Sunday, can bear no substantive relation to a true intent for general rest. General rest is an impossibility on a universally concurrent basis. *A* must labor so that *B* may rest. Were I not to stoke my furnace on Sunday morning, my wife would have to stoke it. Were I even to go to church early on Sunday morning, someone would have to make sure of my

means of transportation and that the infinite interdependence of human activity is maintained. Thus, a law which truly in the public interests seeks to enjoin a universal abstinence from labor once in every seven days would inevitably within the logic of the operations of society have to leave an area where my wife could stoke one day and I could stoke another. This law does not do that. It universally proscribes Sunday, save only for Saturday for some—and that only upon religious grounds. If the proviso of non-operation of the statute was "This section . . . does not extend to persons who regularly and recurringly each seven day period use another day beside Sunday as a day of rest, and abstain thereon from doing things prohibited on Sunday" it might be free of the religious taint of its legislative history. It does not. It follows sine qua that the sole purpose of this law is to enjoin the specific religious purpose of the day recognized as the universal day of rest by enjoinment of God under the viewpoint of the religious majority in the State of Ohio and not in the necessities of society.

There have been two arguments attempting to rebut this. The exemption of "necessity" from the statute is said to leave the way open for the bare "necessary" activity "necessary" to sustain general human existence. That will-o'-the-wisp necessity raises problems both in the area of definiteness of the statute, in the area of universality of application, and of extent, all of which are discussed elsewhere. Suffice it to say at this point that if this were a true statute, designed to rest and recreation rather than religious inent, then a mode of apportioning rest to those engaged in necessary activities would be provided as well, and the sister legislation would not have cut a swath through harmless recreation. The other attempt to escape

the slap-dash police quality of the act, revelatory of its true legislative religious intent, was stated by the lower court in the opinion used in this and the companion *Ullner* case. The court stated that ease of enforcement, because Sunday by tradition and usage was the day when the vast majority rested, justified the legislature, still in the interests of society and not religion, acting with the arbitrary qualities evident in this act. If ease of enforcement can ever be used as an excuse for willy-nilly exercise of police power, such an excuse could have been properly applied here by the formula of prescribing Sunday universally unless some other regularly recurring day was used, perhaps even shifting to the defensive the onus of burden of proof of that regularly recurring other day. But again that was not done. It is Sunday or bust, and that is such arbitrary exercise of police power as to reveal the intent of the law to protect Sunday and not universal rest.

The ease of enforcement excuse fails on even broader grounds. Ease of enforcement can never be used as an excuse for ossification of human relationship and prohibition of things not malum in se. Allow me an example out of my own experience. The music box, sometimes called the juke box, industry, in the City of Cincinnati had ostensibly come under the influence of certain persons whose business methods were allegedly unsavory. This gave rise to suggestion in the City Council that the industry be abolished. That would be a simple solution. It would lend itself to ease of enforcement—there just are not any music boxes in the City of Cincinnati. But the juke box is a pleasant thing, serving a useful function if not abused. It lends itself to the general improvement of a community's morale. Specifically, the situation might have called for ordinances dealing with the business methods used in the

industry. But the outright abolishment of music boxes, which again was the easiest means of resolving the difficulties which had arisen, was an obvious absurdity. By the same token, Ohio should have no traffic laws, it should simply abolish the automobile. That would be a law easier to enforce. So here, an exercise of police power which abolished Sunday not only as a day of commercial enterprise or labor for hire but even if the statute is read carefully, as a day you and I can mow our own grass, chop our firewood, or get someone to fire a hot stove in a general store around which we may discuss next year's baseball season, is an exercise of police power which abolishes all that can be proper and can fit within the framework of its court imposed fictitious intent of rest and recreation. Ease of enforcement under such circumstances cannot justify the reduction to absurdity of police power. Ease of enforcement is indeed the halimark of non-democratic government. Clearly, the sole intent of this statute is to set up Sunday as a holy day within the specific limitations of a holy day as seen by some religious groups.

The last sentence of the last paragraph leads into the next argument, which is a peculiar affirmation from the viewpoint of the Christian that this law is violative of the First Amendment to the Constitution of the United States and of Article I, Section 7, of the Constitution of the State of Ohio. Section 7 says: "No person shall be compelled to . . . maintain any form of worship against his consent. . . . " In even more direct language the First Amendment to the Federal Constitution forbids the passage of a law respecting the establishment of religion, or prohibiting the free exercise thereof. Christianity as practiced by the vast majority--while that is questionable now—but at least as practiced by the majority in the first part of the nine-

teenth century indicated that Sunday was a day solely for contemplation, no labor, no frivolity. The theologists taught that by abstinence from work and mundane pleasures, contemplation was more thoroughly achieved. But even then there were some who did not keep pace with their neighbors, who heard a different drummer, and such a one was Henry David Thoreau, a deeply devout man, whose words I have slightly paraphrased in this sentence. He felt that a man was closer to his God as he hewed and as he labored honestly. There have been others both before and after who have taken this point of view, or ancillary points of view of Christian conduct in team play or other forms of activity which deviated from the early Puritan viewpoint. But on such Christians the laws of Ohio have imposed a form of worship, a mode of recognition of how the Sabbath day should be observed, established an element of religion, and prohibited their free exercise of Christianity itself. The Puritan viewpoint of Sunday is made the law of the State of Ohio. If Thoreau had been in Ohio and if he had gone to Seneca Lake instead of Walden Pond on Sunday, and worked on his cabin and as he worked looked about him and found in his work and his surroundings the glory of his God, lo and behold, there would have appeared an enforcement officer of the State of Ohio and arrested him as a lawbreaker. This is the strange anomaly of this statute. It has been pointed out in my earlief briefs and the briefs of other counsel in companion cases that the law supports Christian belief as against, for instance, Hindu belief but as I recall it it has never been expressed up to this point how this law imposes an interpretive shackle upon Christians themselves. Further for those religious groups which recognize Saturday as a day of rest, it imposes the same Puritan concept, or they forfeit their

exoneration (*Bellingheimer* v. *Ohio*, 32 O. S. 435). The law does impose a religious duty. It makes everyone observe Sunday according to the Puritan or Blue Stocking concept of the day.

One last word on that tremendously revealing aspect of the law, the Saturday proviso. If this law is not a legislative expression of the political desires of religious groups, why limit the exception to Saturday as "conscientiously observed as a Sabbath?" It is feasible that any other day could be a day of rest to some religious group. Why not then a general exception for any other day conscientiously observed? Simply and directly because the legislature was codifying the requests and requirements of all religious groups of politically significant strength, and reflects again the true intent and—in real fact—only significant and logical purpose of this law as it stands.

It will be noted that besides the contention that Ohio Revised Code 3773.24 is in violation of Article I, Section 7 of the Constitution of the State of Ohio, it has also been contended that it is in violation of Article I, Section 2 as well. It is again that Saturday exception which gives rise to this. The statute grants a special privilege or immunity to adherents of specific religious groups, granted and grounded upon their proper adherence to their religious affiliations. As such it overrides—I am speaking of the religious aspect only for the moment—the equal protection of government prescribed by Section 2, giving a special and limited religious right to deviate.

> "Section 13045, General Code, provides simply that persons holding certain religious beliefs shall be amenable to the punishment provided for other persons who perform forbidden acts on Sunday. Insofar as it does so, there is discrimination in favor of such persons

holding such religious beliefs, and against those who do not hold such beliefs." *Kut* v. *Albers Super Markets*, 76 Ohio App. 51, 31 Ohio Opinions 379 at page 381 (1945).

I am most assuredly in favor of the grant of a right to deviate. As indicated perhaps a formula for patterned deviation would justify this statute. But to grant that privilege of deviation solely by reason of the religious belief of the accused, and conditioned upon the quality of his religious adherence, is a special privilege violative of Article I, Section 2 of the Ohio Constitution. It is a special privilege in this sense not only to individuals—that is to be discussed later—but to the religious bodies seeking their adherence. It once again affirms the religious nature of the whole statute.

* * * * * *

B. Ohio Revised Code 3773.24 is unconstitutional in that it conflicts with Article I, Sections 1, 2, and 3 of the Constitution of the State of Ohio, and the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

Although a great deal of discussion has been presented on the religious aspects of Ohio Revised Code 3773.24, it should not be supposed that that is the sole or even primary contention of the appellant. It is merely one, perhaps even not the most significant, of the constitutional interdictions against this statute. The others are to be discussed under this assignment of error. It is pointed out that the questions now to be raised were apparently not raised in *State* v. *Powell*, and were largely by-passed by the Court of Appeals in this case, although the record reveals they were raised.

Appendix "H"

Since two theses will be recurrent and implied in the propositions now to be discussed a brief exposition of both will be stated at this point.

First: At the time the original of Revised Code Section 3773.24 was adopted, and even at the time *State* v. *Powell* was decided, the first ten Amendments to the Constitution of the United States had not been held to apply to the several states. Since that time the Supreme Court of the United States has held that by virtue of the Fourteenth Amendment to the Constitution of the United States those guarantees in the first ten Amendments which are privileges or immunities of citizens of the United States or constitute due process of law or afford the equal protection of the law are binding upon the states. (*Getlow* v. *New York*, 268 U. S. 652 (1925); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *McCollum* v. *Board of Education*, 333 U. S. 203 (1948); *Kedroff* v. *St. Nicholas Cathedral*, 97 Supreme Court Lawyer's Edition 95 (1952); *Brown* v. *Board of Education*, 347 U. S. 483, etc.)

Second: Ohio Revised Code 3773.24 must at all times be considered not in and of itself but in pari materia with the general laws upon the same subject, to wit, all Sunday legislation. This proposition, enunciated in *Stanfeal* v. *State*, 78 Ohio State 24, was as recently re-enunciated as April 6, 1956, in *State* v. *Keich*, 76 Ohio Abstracts 180 at page 181.

> "In the case of *Stanfeal* v. *State*, 78 Ohio State 24, upon which defendants rely heavily to secure a reversal of the judgment of the trial court, Stanfeal, a barber, kept his barber shop closed on Saturday in accordance with his religious belief forbidding work on Saturday and opened his shop for business on Sunday. In that case the Supreme Court held:

Appendix "H"

"'While the statutes making the business of barbering on Sunday illegal appear, not as amendments to the general laws theretofore existing, but in the form of independent enactments, still they relate to the same subject, to-wit, the observance of Sunday, and are to be regarded as in pari materia with the general laws upon the same subject, . . . Hence we must consider all the Sunday legislation when we decide the claim of class legislation.

"'The court in the case of *Robins* v. *State*, 19 Ohio Nisi Prius (n.s.) 606, after citing the case of *Stanfeal* v. *State*, supra, said:—

"'"This we conclude is a recognition by the Supreme Court that § 13047 GC, is in pari materia with §§ 13044 and 13045 GC, of the Sunday law, where an exception in favor of those persons who conscientiously observe the seventh day of the week as the Sabbath, and abstain thereon from doing things therein prohibited on Sunday, is provided."

"'The rule appears well established that statutes in pari materia are to be construed together and as one act.

"'"Where there are earlier acts relating to the same subject the survey must extend to them; for all are for the purpose of construction considered as forming one homogeneous and consistent body of law, and each of them may explain and elucidate, every other part of the common system to which it belongs." *Endlich, Interp.*, Stat., Section 43.'"

a. Ohio Revised Code 3773.24 is violative of due process of law.

In my earlier brief on constitutional grounds, I raised the argument that this statute was unconstitutional because it forbids all forms of commercial dealings on Sunday. I quoted *Olds* v. *Klotz*, 131 O. S. 447, and then pointed out how this law goes far beyond the Toledo ordinance struck

down in that case. Every citizen has a proprietary right to engage in business or gainful labor. Public welfare may dictate regulation; the provisions of wage and hour laws are such a proper exercise of police power. But prohibition of such activity, totally or even absolutely for a given day, rather than an optional day is an arbitrary exercise of police power and violative of due process. There is too much interdependence in human needs and too much unpredictable in human events to find sweet reasonableness in the absolute interdictions of this law. Nobility of purpose in the legislature, and the Courts have striven might mightily to find such here, does not excuse arbitrary execution.

In *Cincinnati* v. *Correll*, 141 O. S. 535 (1943), this Court had before it an ordinance limiting and fixing the hours and days during which a barber shop may remain open for business. Noting that barbering is a lawful business, the court determined that the right to carry on such a business is a property right, protected by both the Federal and Ohio constitutions against unwarranted and arbitrary interference by legislative bodies. An absolute forbidding of all business on a given and fixed day of the week must be arbitrary and capricious. Strictly construed this statute dictates that society should curl up in an embryonic state of ineptitude on Sunday. Its very absurdity has stayed the hand of true general enforcement in the past, but it is a dangerous state of law when roughshod legislative enactment must be established in reasonableness by administrative discretion and lassitude. It makes for a government of men and not of law. It is constitutionally abhorrent.

These arguments I raised in my earlier brief. Since then I have restudied the statute and have found it is a

great deal worse. It not only forbids all forms of commercial dealings on Sunday but forbids all forms of common labor. This is not delimited to common labor for hire but all forms of common labor. Moreover implied in Revised Code 3773.24 and spelled out in the sister statutes even harmless recreation is forbidden. We spill out of merely violation of due process in these Sunday laws, but even into abridgments of the privileges and immunities of citizens, and curtailments of free speech and assembly. The printing of a pamphlet on Sunday, the distribution of a pamphlet on Sunday are common labor. The opening of a privately owned auditorium and charging admission for a dramatic presentation or a musicale would be opening a place for the transaction of business, and be even directly forbidden under the recreation statutes.

Every member of this Court and myself have violated Ohio Revised Code 3773.24 or its sister statutes. To confess my own violation, which to avoid self incrimination I shall make eleven days ago and thus run the statute of limitations included in the statute, I helped my wife with the washing on a Sunday afternoon because she wanted to go to a luncheon on Monday. I engaged in common labor and am guilty of a violation of the statute. So every member of this Court, if, on a camping trip, cooked up his food on Sunday, or if, at home, mowed the grass or washed the car is equally guilty. And yet, I contend, that under the first section of Article I of the Bill of Rights, under the Constitution of Ohio and under the Fourteenth Amendment of the Constitution of the United States we had an inalienable right to help our wives with the laundry, cook our camp lunch, cut the grass, or wash the car and that the statute could not take that away from us unless a profound and cogent reason could be found in the public in-

terest to do so. I find no such reason. The gambit of rest does not reduce us to the limited choice of church, charity, a drink of intoxicating liquor until 2:30 A. M., and baseball and movies in the afternoon only. Rest and recreation do not dictate vegetation. It did the Court and me good to change pace from the litigative and responsible course of our everyday life and to engage in the innocent, harmless and pleasant labors of helping our wife, mowing the grass, washing the car, or cooking our camp luncheon.

But to limit the argument to the specific facts of the given case, I merely requote from *Olds* v. *Klotz*, 131 O. S. 447 at page 451, which reads as if a decision in this case:

> ". . . places for distribution of foodstuffs are wholly necessary in order to furnish daily nourishment to the masses of our people. Wisely, laws have been enacted to assure the purity and wholesomeness of food; but the limitation of hours that products of that kind may be sold by retail to the public seems to be of minor consideration in relation to the public health in comparison with the necessity of having food available at the time it may be required to supply pressing human want. Food is vital to health, and even to life itself. Its need for nourishment to sick and well, to adult and child, is quite as pressing a consideration from a health standpoint, as that which requires that food be retailed in stores under conditions which are consonant with proper requirements of sanitation. All the authorities seem to be in accord with the proposition that the police power does not extend to the limitation of hours within which retail stores, selling either groceries or other commodities or both, may be kept open to customers. Every business has some relation to the general welfare, because there is none which is operated to supply consumers generally that does not have some public aspect; but the regulation thereof is not within the police power unless the relation to

the public interest and the common good is substantial and the terms of the law or ordinance are reasonable and not arbitrary in character."

b. Ohio Revised Code 3773.24 alone and in conjunction with other legislation denies the equal protection of the law.

* * * * * *

Should there be but one man in the State of Ohio who is untouched by the Sunday laws, whose exemption is not explained by the necessity of the common welfare, then this law must fall.

These then are the exceptions to the Sunday laws:

1. Baseball playing in the afternoon.
2. Exhibition of motion pictures in the afternoon.
3. Children under fourteen years of age.
4. "Work of necessity."
5. "Work of charity."
6. Observers of Saturday as Sabbath.
7. Traveling emigrating families.
8. Watermen engaged in landing their passengers.
9. Keepers of toll bridges, tollgates, or ferries.
10. Trapshooting in afternoon only and only when conducted under the auspices of a recognized hunt, trapshooting, rifle or game club.
11. Sales of intoxicating liquor until 2:30 A. M.

What plausible, reasonable, and substantial basis is there for explaining this strange welter? I can find none. In *State* v. *Haase*, 97 O. A. 377, 56 O. O. 144, 68 O. L. A. 193, the Court came up with this attempted justification:

"It is noted that, except for attending the means of public travel and engaging in sports or other forms of public entertainment or recreation, the only permissible Sunday business activities are works of neces-

> sity or charity. The Statutes of Ohio, therefore, do not permit some business to operate on Sunday and deny the same rights to others of like character. The decision holding Sunday Closing Laws unconstitutional because they permit some business to operate on Sundays and deny the same right to others, are not applicable."

Without disrespect to that court, I can only say how woefully insufficient. Only certain means of public travel are exempted. What of busses, trucks, streetcars, trains, planes, taxis, even private automobiles? What public purpose of privilege attends more forcibly to keepers of toll bridges, tollgates and ferries than to them? What public purpose of privilege attends more forcibly to watermen engaged in landing their passengers than to watermen engaged in embarking their passengers or just sailing along? Where is there a distinction in kind between other forms of sporting and baseball? Where is there a distinction in kind between the specifically interdicted live drama and the permissible motion pictures? What the Court did in the *Haase* case was partially to categorize some of the exceptions, ignore the fact that even within the category there was no uniformity, and then from the imperfectly achieved generalization push a rationale. And even that rationale is assertive rather than empirical. Can a valid distinction be found for favoring some commercialized recreation over the availability of do-it-yourself recreational supplies? Can a true rationale be achieved for favoring public transportation over public sustenance?

I am totally and completely perplexed in my efforts to find a public purpose in that my client was convicted for selling milk to babies while the law of Ohio allows the sale of intoxicating liquors until 2:30 A. M. on Sunday morn-

ing. Why the inexplicable exemption of children under fourteen? You cannot even play golf—it's sporting—yet a boy of twelve can caddy for hire. Why are the Saturday observants blessed and the Friday observants ignored? Why are the Saturday observants exempted on religious grounds alone? Why is the contractor under the rule of *Bloom* v. *Richards*, 2 O. S. 387, exempt and the dealer in personalty not? Why may I give advice for hire on Sunday with its ulcer-breeding responsibility, while the tranquil stonemason may not voluntarily build a wall to keep harmony with his neighbor? There is only one true rationale for the legislative and interpretive exemptions. The legislature, having come up with a basically arbitrary law, and the courts, faced with justifying the same, have welded adaptations to specific pressures and yielded unequal protection of the law.

But I have not touched on the strangest qualities of unequal protection of the law which these Sunday laws have yielded. It is what I shall call the epithetical exemption. It arises from that nebulous exemption of businesses of necessity and can be best illustrated by quotations from actual cases:

In *State* v. *Keich*, 76 Abs. 180, at page 182 the court says:

> "While there is quoted evidence that defendants sold articles other than hardware, such as drug sundries, yet defendants Steinberg and Keich catalogued their stores respectively as a 'general store' and 'department store,' which under normal conditions cannot be designated as business or work of 'necessity' . . ."

Impliedly then if they had labeled their store "drugstore" they would have been exempt. In this very case

an interesting dialogue takes place between the Court and counsel during the original trial. . . . Counsel for defendant gave the Court an example of a situation in which insect powder purchased by the police officers in this case, could be deemed a necessity. The Court's response to this was that if the commodity was in fact a necessity it could be bought in a drugstore. Here then is a gigantic repository of unequal protection of this law. The druggist may deal in all forms of necessity, he is Sunday's child, fair of face and full of legislative grace, and other merchants are foreclosed. Had my client called himself Albert's Drug Emporium, for he does handle aspirin, Bromo-seltzer, and insect powder, would he today be free of the conviction hanging over him? Soap, cosmetics, and a thousand items of merchandise are handled concurrently by him and a drugstore. Where is there a valid distinction, especially in this age when specific foodstuffs are sometimes medically prescribed items? The attempted escape valve of unequal protection being manufactured by saying, "In our opinion Ohio Revised Code 3773.24 is not discriminating because it applies to all who are engaged in like business" (*State* v. *Keich*, 76 Abs. 180, 181) falls flat on its face in an era when you can buy a sandwich in a gasoline station, a tire in a grocery, a prescription in a general store, and a hammer and saw in a drugstore. All businesses smack to some degree of necessity and to some degree of luxury. Pick a name that rings of necessity and you are in grand shape. This is the epithetical exemption.

In the State of Florida in 1952 a Sunday law exempting newspapers, movies, filling stations, tourist attractions, outlying grocery stores, hotels, drugstores, parking lots, transportation companies, or facilities and public utilities was struck down as discriminatory by the Supreme Court

of that state. (*Henderson* v. *Antonacci*, 62 S. 2nd 5 (1952).) The legislature of Florida then re-enacted the law, dropping all the multiplicity of exemptions save newspapers and movies. This new statute came under review in *Kelley* v. *Blackburn*, 95 S. (2nd) 260 (1957), and the Court held that the elimination of the multiplicity of exemptions made no difference as long as any exemptions still existed. The apparent ruling factor was not that the law operate equally upon all within a certain class or classes, but that there must be a valid and substantial reason to make such laws operate only upon certain classes rather than generally upon all. Under either approach the Ohio Sunday laws are defective. They certainly do not operate equally upon all, and even within classes, e. g. transportation facilities, or recreation make pointless distinctions.

c. Ohio Revised Code 3773.24 is unconstitutional as a criminal statute in that it is indefinite of definition and imposes a criminal penalty upon the exercise of judgment.

• • • • • •

In *United States* v. *Cohen Grocery*, 255 U. S. 81, the Lever Act of August 10, 1917, paragraph 4, as re-enacted on October 22, 1919, paragraph 2, was under an attack as to its constitutionality. The act provided criminal punishment for any person who willfully made "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." The Court held that this act violated the Fifth and Sixth Amendments to the United States Constitution which require an ascertainable standard clearly fixed by Congress rather than by courts and juries and which secured to the accused persons the right to be informed of the nature and cause of the accusation against them. This fundamental principle has been constantly reiterated.

Appendix "H"

> "Laws which create crime ought to be so explained that all men subject to their penalties may know what act it is their duty to avoid." (*United States* v. *Brewer*, 139 U. S. 278, 11 Sup. Ct. Reporter 538.)

I have dwelt at length in the earlier brief on the vagueness of this act, and shall not repeat the multiplicity of examples contained therein. I can point out a few more. If this section does not prevent emigrating families from traveling, what about those whose services are incident to their travels, the grocer who sells them food, the mechanic who services their car? Can they stay open to supply the emigrating family? If they are open can they continue to stay open for all comers? Or must they have absolute scienter of the act of emigration before they dare open their doors? Can the waterman do anything besides unload passengers? Who determines necessity? Does necessity move from the general to the particular or from the particular to the general? For example, is Mrs. Lawson's overwhelming need for milk . . . justification for being open, a move from the particular to the general? Or is a community catastrophe the only reason for opening, a move from the general to the particular, and once open, can you sell to anybody, even if you know that they are hoarding? Must you evaluate your customer's need? Must you evaluate your community's need? Is that evaluation to be achieved on a block-wide, city-wide, or county-wide environmental situation? Must you evaluate the relative quality of necessity of sustenance as opposed to relative quality of necessity of transportation? Since some food is required, how many grocery stores or delicatessens per units of population should remain open? Should it be me or my competitor down the block? If we both open are we each no longer necessary, or if we both close are we deny-

ing our community responsibility? I can go on in this tack indefinitely.

How has Ohio fared in its efforts to establish some standard by which a man can know what he is to do?

In *McKattridge* v. *Wason,* 4 O. S. 566, the defendant asked an employee to help him place machinery on a vessel which was about to sail. The vessel sailed on Sunday and defendant had to get machinery aboard to complete a contractual obligation. The Court said:

> ". . . works of necessity are not limited to labor for the preservation of life, health or property from impending danger. The necessity may grow out of or indeed be incident to the general course of trade or business or even be an exigency of a particular trade or business, yet be within the exception of the Act, the danger of navigation being closed, may make it lawful to load a vessel on Sunday if there is no other time to do it."

In a series of grocery store cases, the lower Courts further defined the word "necessity," and in the process throttled the *McKattridge* case. In *Schlichte* v. *Ohio,* 8 O. N. P. n.s. 265, the defendant opened his grocery store for business on Sunday. The Court held that:

> ". . . it is not a necessity to buy anything on the first day of the week which, by the exercise of proper care should be purchased the day previous. Sales, to be a matter of 'necessity' must be of things which reasonable foresight could not require you to purchase on another day, such as drugs or medicines."

In *Straka* v. *Ohio,* 16 O. N. P. n.s. 554, the defendant owned a bakery selling bread on Sunday. The Court held that this was not a work of "necessity" since he did not

have to bake on Sunday to have enough bread for over the week end.

In *Beal* v. *Ohio,* 9 O. A. 319, and *Derrick* v. *Ohio,* 29 O. C. A. 111, the defendants were meat dealers who sold their products on Sundays. They maintained that the communities they served were poor and had no iceboxes in which to store the meat. The Court held that inasmuch as both the violations had occurred in the wintertime, there was no problem of storage, and hence, no necessity to sell on Sunday. Impliedly then in the dog days of the summer such sales would be proper.

Does this interpretive history settle anything? In the early and only Supreme Court case there was sound reasoning, which would justify opening in response to the demand situation set forth by the record of this case, though even there some area of doubt and exercise of judgment would be involved. What followed in the lower courts recreated a chaos of indefiniteness. The *Schlichte* case applies an absurd rule, not even implied in the *McKattridge* case. A failure of foresight cannot dissipate an existing situation of necessity, and the mechanics of foresight may not be available as they were in fact not available to Mrs. Lawson (no refrigerator and eleven children) in this case. In the *Straka* case we have a court anticipating the demand for a necessity. And in the *Beal* case we hit the reductio ad absurdum. When does it get hot enough and when does it get cold enough to distinguish necessity from nonnecessity? The Courts had better sit every Sunday morning prepared to give declaratory judgments on whether the given Sunday's temperature precludes or allows the sale of meat.

The statute should speak for itself as to the standard of conduct. Here we have a statute so nebulous that the

courts have compounded the vagueness in their efforts with it.

There are no poles to this question of necessity. In my neighborhood there is not even any form of public transporation. It is not profitable for the bus company, because there is such a high incidence of privately owned automobiles. Yet under ordinary circumstances a bus line is a necessity. The quality of necessity of a grocery store varies from a rooming house, transitory, low-income neighborhood to a neighborhood such as mine. How then is necessity ever determined save in a given context? And if so where is there a standard of conduct by which one may act?

* * * * * *

The Court of Appeals of Hamilton County, Ohio, erred in affirming the conviction of the defendants obtained by a mode of administrative conduct, arrest and trial that are in conflict with the protections granted by Article I, Sections 1, 10 and 16 of the Constitution of the State of Ohio and the Sixth and Fourteenth Amendments of the Constitution of the United States.

* * * * * *

I shall not repeat the arguments on the violation of due process involved in an unannounced about-face of long-standing public enforcement policy in the face of a strong and necessarily interpretive possibility of exemption, except to answer the issue that has been raised that I am suggesting that the police department is charged with a duty of announcing to the lawbreaker that he is breaking the law. Nothing of the sort is, of course, meant in this instance. It is only the peculiarly delimiting facts of the situation which give rise to the argument. They are as follows:

Appendix "H"

(1) The statute forbids something not malum in se; rather it forbids something normally fostered and approved by the state and society.

(2) The statute affords exceptions, which the appellant's business categorically and uniquely by the neighborhood in which it is located could fit.

(3) There is a long history of the appellant's own business and of similar operations not being molested, even patronized, and protected by enforcement officials on Sunday. The State of Ohio even licenses them to sell 3.2 beer on Sunday.

(4) Public officials initiated this matter, not private warrant.

(5) Public officials did not issue an order or statement for general information, did not issue any indication of their interpretations or standard of conduct that they deemed required by law, and did not in any way issue any indication that repetition of a reasonably possibly exempt act, for many years openly and publicly performed under the benevolent smile and cooperation of those selfsame public officials would no longer be considered exempt.

(6) Apparently general enforcement was not announced, ordered privately, or even intended, but public officials, instructed to make *some arrests*, hiding their official position behind plain clothes and not briefed in a standard, and not explaining their purpose, and standing in line with goodwill citizens, whose needs are in no way explored, create the cloth of the violation which was tried. All these facts are evident from the examinations of Officer Freytag, . . . Policewoman Shell . . . and

Appendix "H"

> Police Chief Schrotel . . . in the record . . . in so far as the Court allowed testimony on the point.

All of these circumstances in combination, which are unique and limited, are what give rise to the argument that the mode of arrest in this instance was violative of the appellant's rights. Under such and similar combinations of circumstances it may be very well said that the principle is that the arresting officer is bound to give prior warning, but it is unfair and a sophistry to divorce the situation from its unique facts and assert that I am here creating a general requirement upon officialdom to notify the lawbreaker that he in violation of a statute.

In *Toolson* v. *New York Yankees,* 346 U. S. 356, 98 L. Ed. 64, 68 (1953), the Supreme Court of the United States, recognizing that professional baseball was in true fact a business, nevertheless said: ". . . that the business of providing public baseball games for profit . . . was not within the scope of the federal anti-trust laws . . . (as) the business (had) been left for thirty years to develop, on the understanding that it was not subject to existing anti-trust legislation. . . ." Here William Kidd and Barbara Mills were allowed to open on Sunday for many years upon the entirely reasonable presumption that their particular operation was not under the purview of the Sunday laws. If a court is constrained to withhold action on what is a false but tolerated impression, what more stringent restraint is there upon administrative officials on what is a soundly reasonable position, born in part of their allowance and cooperation?

Unequal enforcement can be in the area of administrative enforcement as well as in the area of statutory enactment and court interpretation. The arrest of *A* and the

non-arrest of *B* is not sufficient. That is obvious. But where the record reveals that the arresting officials have called to their attention a widespread alleged violation and the arresting officials do not promulgate an order for general enforcement, or even suggest a standard of violation in a foggy situation, or do not order the arrest of all those alleged to then be violators, but only call in two officers, detailing them to arresting only a couple—apparently at their uninstructed whim—and send them off in plain clothes, hiding their identity as officers, afterwards announcing they seek only test cases and will make no further arrests, then we have an aggravated situation that does bespeak unequal administrative enforcement of the law. Granted that it is no defense to say *A* was arrested and two thousand others were not, nevertheless it is a defense to say that the acts of the police both before and after the arrest were such as to say that the police established a policy of unequal enforcement and acted thereon.

As to the trial itself the record is replete with the Court's barring efforts to establish the basis for the above contentions. Further the Court constitutionally erred in failing to sustain the motion to quash the affidavit against Kidd because its ambiguity of language left him uninformed of whether he was charged with the mere act of opening a building or with doing business on Sunday. He was not allowed "to demand the nature and cause of the accusation against him." The Court's rulings on necessity, that it was a magic self-sustaining thing, deprived the defendants of full and proper opportunity to present their defense to their alleged crime, in violation of due process.

* * * * * *